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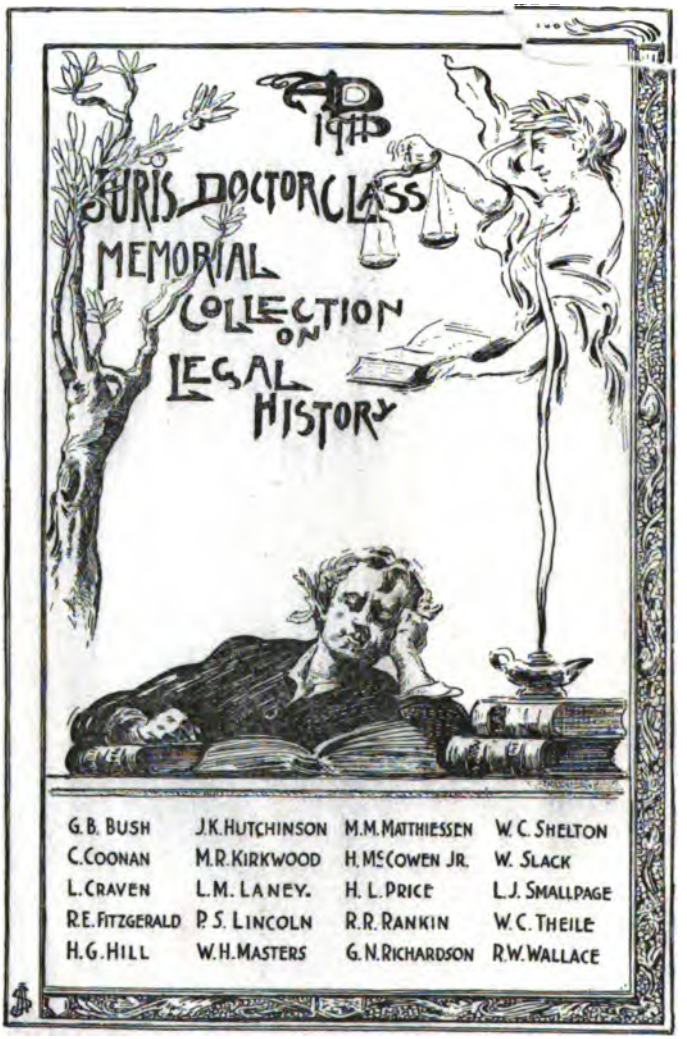
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A TRANSLATION

OF

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BY

JOHN BEAMES, ESQ.

OF LINCOLN'S INN, BARRISTER AT LAW

TO WHICH ARE ADDED NOTES

Multa ignoramus, quæ nobis non laterent, si Veterum lectio nobis esset familiaris. MACROB.

WITH AN INTRODUCTION

BY

JOSEPH HENRY BEALE, JR., A.M., LL.B.

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WITH WHICH

HIS ABILITIES, AS A SENATOR,

AND HIS

TALENTS, AS AN ADVOCATE,

ARE VIEWED BY

THE TRANSLATOR.

A TREATISE

ON

THE LAWS AND CUSTOMS

OF THE

KINGDOM OF ENGLAND

COMPOSED IN THE TIME OF KING HENRY THE SECOND

The illustrious Ranulph de Glanville, who of all in that age was the most skilled in the Laws of the Realm, and the ancient Customs thereof, then holding the helm of Justice.

The present work contains those Laws and Customs only, according to which Pleas are determined in the King's Court, the Exchequer, and before the Justices, wheresoever they may be.

INTRODUCTION.

BY JOSEPH HENRY BEALE, JR., A.M., LL.B., PROFESSOR OF LAW IN HARVARD UNIVERSITY.

I. RANULPH DE GLANVILLE.

RANULPH DE GLANVILLE was born in the Suffolk Stratford, about 1130 A.D. He is believed to have been the son of Sir Hervey de Glanville, Chamberlain to King Stephen, and the grandson of that Ranulph de Glanville who came over with the Conqueror. The family was an important one, owning much land in the counties of Suffolk and Norfolk. Glanville's public life began in 1164, when he was appointed sheriff of Yorkshire; an office which he continued to hold for six years. In 1171 he was appointed Governor of Richmond Castle, and in 1174, sheriff of Lancashire. The Scots having invaded England in that year, he led the forces of Lancashire and Richmond against them, and (joining the sheriff of Yorkshire and his forces) surprised and routed the Scots at Alnwick, and took King William the Lion prisoner. For this victory Glanville deserved, as he certainly received, the credit; and from that time no man stood higher than he in the favor of King Henry II. He was sheriff of Westmoreland from 1175 to 1179; sheriff of Yorkshire a second time, from

1177 to his death; judge of the King's Court in 1176, and Chief Justiciar in 1180. He was also employed in many distinguished public services. In 1177 he was sent as ambassador to Flanders. In 1182 he led an army against the Welsh. In 1184, with Archbishop Baldwin, he was sent as ambassador to Rice ap Griffin, Prince of South Wales. In his next Welsh expedition, a few years later (again with Baldwin), he preached a crusade. In 1186 he was ambassador to the King of France, and was active in negotiating the peace of Gisors. In 1189, while Henry was struggling with his rebellious sons and with Philip of France in Normandy, he was sent to Canterbury to treat with the Chapter; was soon again in Normandy with Henry; and finally returned to England to raise an army for his master's service, a work in which he was engaged at the time of Henry's death.

These great offices were due to his personal merit and to the great services he rendered to his country; but they appear to have been the result, also, of the personal friendship and affection of the King. He was one of the witnesses to Henry's will, and a trustee of the King's bequest of 5,000 marks of silver to certain religious and charitable institutions, and of 300 marks of gold for marrying poor free women of England. He was named by Henry as custodian of Queen Eleanor, and as treasurer of his private fortune. A pretty picture of the King's feeling toward him occurs in the account of the arrival of Glanville's messenger in London, after the battle of Alnwick.

The messenger arrived at midnight and insisted on seeing the King. Being admitted to the royal chamber he boldly approached the King's bed and roused him from sleep. He, springing up, cried, "Who is it?" "I am the messenger of Ranulph of Glanville, your faithful subject, and I come from him to your highness as a bearer of good tidings." "Is our Ranulph well?" cried the King, moved less by the promised good tidings than by his love for the sender of them. "My lord is well," was the answer, "and he holds your enemy, the King of the Scots, a prisoner at Richmond."

Upon the death of Henry, Glanville's position was a difficult one. Henry, conservative, though a reformer, had established the government of his kingdom on a foundation of law and justice, and had created an effective and pure administrative machine. The new King appeared to have no sympathy with his father's principles of government. He was rash, radical and careless of regular details of administration, and Glanville, in the words of a contemporary, "In his old age saw the King doing many things in a new-fangled way, without wisdom or forethought." He was present at the coronation of Richard, and was sent by him to quell a riot against the Jews which disgraced the ceremony. About his next acts we have different accounts. He had taken the cross in 1186. Whether he asked and received his dismissal from Richard in order to join the army, then about to start for the Holy Land, or whether, as another account has it,

he was removed and imprisoned by Richard and obliged to purchase his freedom by a fine of 15,000 pounds of silver, we cannot certainly tell. At any rate, he set out for Palestine together with Baldwin, Archbishop of Canterbury, and his nephew Hubert, then bishop of Salisbury; the three were placed in command of the English forces by Richard (who was obliged to delay his own departure), and Glanville in 1190 died before Acre, by disease, the result of the unhealthy climate. He left one son and three daughters, whom he had already enriched from his great fortune. He founded the priory of Butley, the Abbey of Leiston, and a hospital at Somerton.

Glanville impressed his contemporaries as a man strong both in body and in mind. A man of integrity and prudence, "most faithful in fortune or misfortune," "Wise, grave and eloquent," "The King's eye;" "A name above every name, who spoke among the princes and was adored by the people." He was a man wise, just and charitable, whose fellowship was sought and opinions valued by wits and by scholars. One scandal only attacked him. He is charged with falsely condemning to death for rape Sir Gilbert de Plumpton, in order that his widow might be married to Glanville's friend and steward, Rainer; Sir Gilbert's punishment was commuted by the King to imprisonment for life. The tale is quite inconsistent with all we know of Glanville's character and with his position in the King's affection, and may safely be disbelieved.

His family shared in his success. No less than seven

of his near relatives held high judicial position under Henry or his sons. Few other families have rendered greater service to England than that of Ranulph de Glanville, ambassador, administrator, general, judge and jurist.

[Incidents of Glanville's life and character are reported in all the chroniclers of the time. Especially valuable are the accounts in Hoveden, Benedictus Abbas, Giraldus Cambrensis, Newburgh, Richard of Devizes, and Diceto. The fullest modern sketch of his life is by Professor Maitland, in the Dictionary of National Biography. Other modern biographies are those of Foss (Judges of England, i, 376); Thomas Wright (Biographia Britannica, 275); Lord Campbell (Lives of the Chief Justices, i, 19); and Professor Gross (Sources and Literature of English History, 315).

Many interesting documents bearing on Glanville's genealogy and his property are printed in Glanville-Richards' "Records of the Anglo-Norman House of Glanville."]

II. THE AUTHORSHIP OF THE TREATISE.

THE following "Treatise on the Laws and Customs of the Kingdom of England," was published between 1187 and 1189; it mentions a fine made in the former year, and it is filled with references to Henry, as then King. It had a high contemporary reputation. Copies of the book were multiplied, and many manuscripts still exist. It forms part of several collections of laws made by contemporaries of Glanville himself. It was translated, or partly translated, into French immediately after Glanville's death, and it was revised and an attempt made to bring it down to date two genera-

tions later. It was finally superseded by Bracton's completer and more elaborate treatise.

The work itself is anonymous, the manuscripts stating only that it was composed in the time of Henry II., "Glanville then holding the helm of justice." Early tradition, however, asserts that it was written by Glanville himself, and that fact was accepted as undoubted from the thirteenth to the nineteenth century. Modern scholars have expressed doubt of it. Littleton's objection (in his "Life of Henry II.") that Glanville could not have written the book because he was not in orders, may be dismissed at once. The greater officers of the administration, whether in orders or not, must have had sufficient Latin to dictate a Latin treatise to a clerk, and Glanville was particularly commended for his eloquence by more than one contemporary. Hunter's objection (in the preface to his "Fines") is that Glanville, at the time the treatise was written, was too busy in public affairs to have composed such a work, and he suggests that the author may have been William de Glanville, a justice in the next reign; who was, in fact, Glanville's son, and (from 1186) his secretary. But this is the merest guess. Professor Maitland conjectures (for a rather fanciful reason, perhaps) that the author may have been Hubert Walter. Liebermann, on the other hand, defends Glanville's authorship. Certainly there is little external proof that Glanville was the author of the treatise, though it must have been written by some one in high position and repute to have obtained so imme-

diate a success. The internal evidence does not lead us much further. The style is that of a person speaking with authority, but not necessarily the authority of the Chief Justiciar himself. The claim of Hubert Walter to the authorship cannot be dismissed without further examination.

Hubert was a nephew of Glanville's wife; according to one account, of Glanville himself, Glanville's younger brother having married his wife's sister. Whether Hervey Walter, Hubert's father, was really, as this account has it, Hervey de Glanville or not, it is certain that Hubert was brought up in intimacy with Glanville's family, became his secretary, and was regarded by him as a valued counsellor. He was made Dean of York in 1186, being succeeded as secretary by Glanville's son William. He soon became Bishop of Salisbury, Archbishop of Canterbury, and later Chief Justiciar and Chancellor of the Kingdom. He is described as a man of foresight and wisdom; it is said of him that his heart was in human affairs rather than divine, and that he knew all the laws of the kingdom. He was, however, a man "of little eloquence;" indeed, one chronicler ridicules his Latin style.

Did Glanville write the whole treatise? or did Hubert Walter write it? Or did they collaborate on it? Perhaps we can reach a conjectural conclusion by a more careful examination of the treatise itself.

The most striking feature of the treatise is, that it is based upon a collection of writs. Omitting the Introduction and the last book, on Pleas of the Crown, just

one-third of the chapters into which it is divided consists of writs. These are of all kinds, directed to Lords' Courts, to County Courts, and to Ecclesiastical Courts, as well as writs returnable in the King's Courts. Later writers have made free use of writs, but here they are the skeleton of the whole treatise. They fulfil the function of judgment-rolls in Bracton's book, and of decisions in Coke and later writers. The collection of these eighty writs must have been a work of several years, since some of the writs were certainly of rare occurrence. The Chief Justice, or his clerk, attested all the writs, and either of them had both opportunity and reason for making such a collection; hardly another man in the kingdom would have been likely to do it.

A large part of the treatise is written in a crabbed and inelegant, though usually a clear style. In a few passages, however, near the beginning of the book, we find an elevation of thought and elegance of diction often admired and imitated. The Introduction, in particular, and the seventh chapter of the second book, in praise of the assize (which, according to tradition, Glanville had a hand in inventing, or, at least, in establishing), are worthy of a man "sapiens simul et eloquens"; in sharp contrast with other parts of the work, which indicate an author who "omnia regni novit jura," but was surely "non eloquio pollens."

The first ten books of the treatise are carefully written, the commentary is full, the subject well developed. The last four books, on the other hand, seem

to have been hurriedly thrown together. The proportion of writ to text is more than twice that in the preceding books; indeed, in the book devoted to the County Courts (in which Glanville had presided for years, and must have become as familiar with the law and procedure as with those of the King's Courts), there is almost no comment. It seems possible that a proposed full commentary on the County Court practice, for which an elaborate collection of writs was at hand, was abandoned.

The exact date of the work is fixed by the only two dated documents—two fines, of June 27 and about November 1, 1187. Fines were then novel, and they were described carefully. It seems likely that the passage, which occurs toward the end of the treatise, was written soon after the dates of enrollment. Both fines were enrolled in Glanville's presence.

We may now conjecture that the author, or authors, of the treatise had for years been collecting writs, either for preservation as useful precedents, or possibly with the object of composing a commentary upon them. The collection finished, it would not be a matter of much time or difficulty for one who knew the law, writs in hand, to dictate his commentary to a secretary also learned in the law. If the collector was Glanville, and the secretary Hubert, we may suppose that the actual work of composition was begun in 1185, or 1186; not, apparently, a time of strenuous labor for either. Passages of particular importance or of especial interest to Glanville would be composed by

him with care; the actual form of the remainder might safely be left to his competent secretary, subject only to revision by himself. In 1186 the Dean of York died, and the succession was given to Hubert; and Glanville soon set out on his embassy to the King of France. In spite of this, however, time still remained for the completion of the work in the rather less polished form of the later books. In February, 1187, Glanville and Hubert were sitting together in the Court at Westminster; and from that month to the beginning of 1189 (with the exception of Lent, 1188, when Glanville was preaching his crusade in Wales), both appear to have remained in England, without serious interruption from public business. The year 1188, in fact, seems to have been one of the least busy of Glanville's official life; and, until his time was absorbed by the troubles of the closing year of the reign, there was nothing to prevent a continuance of the work. The last hurried chapters may well, therefore, have been completed in 1188.

There is, then, nothing against the early and persistent tradition that Glanville wrote the treatise, and much in its favor; though most of the actual composition may have been the work of Hubert Walter.

[The fullest discussion of the authorship of "Glanville" may be found in Pollock and Maitland's "History of the English Law," i, 163. Reeves' discussion ("History of the English Law," Finlayson's Edition, i, 254) and Foss's ("Judges of England," i, 180) are also worth consulting upon this point. Liebermann ("Einleitung," p. 73) supports the theory of Glanville's authorship; and in the "Zeitschrift fur romanische Philologie," xix,

81, he gives interesting proof of the early popularity of the treatise. See also Professor Maitland's article, "Glanville Revised," in the Harvard Law Review, vi, 1.

The life and character of Hubert may be found in the "Actus Pontificum Cantuariensium" of Gervase. Glanville's and Hubert's itineraries may be found in Eyton's "Itinerary of Henry II."]

III. THE CHARACTER OF THE TREATISE.

"A TREATISE on the Law and Customs of the Kingdom of England" is the earliest systematic treatise on law written in modern times. A few collections of law and decretals, like the *Decretum* of Gratian and the "Assises of Jerusalem," had, to be sure, been published earlier; but they were not, like this book, regular expositions of an existing system of law. Bracton's work was modelled on Glanville, and, through Bracton, Glanville thus fixed the type of the modern commentary on law. An imitation, in many parts an exact copy, of this book was later published in Scotland under the title "Regiam Majestatem," and the claim was vigorously made for a time that it was the original, Glanville the imitation. This notion, improbable on its face, was absolutely disproved by arguments set forth in Beames' Introduction.

The first edition of the treatise was printed by R. Tottel in small 12mo, about the year 1554. Coke says that this was done by suggestion of Sir William Stanford, the learned judge and author. The second edition was printed by Thomas Wright in 1604. The text was corrected by the collation of "various manu-

scripts." This edition was exactly reprinted, omitting the preface, in 1673. The treatise was again printed in the first volume of Houard's "*Traités sur les Coutumes Anglo-Normandes*" in quarto, Rouen, 1776. The last Latin edition was published by John Rayner, 8vo, 1780, collated with the Bodleian, the Cottonian, the Harleian and Doctor Milles's manuscripts by J. E. Wilmot. The Latin text is also printed as an appendix to Phillips's "Englische Reichs und Rechtsgeschichte," ii, 335: Berlin, 1828. A collation of Glanville with the "Regiam Majestatem" may be found in the Acts of the Parliament of Scotland, i, 133. An English translation by John Beames, with notes, was published in octavo, London, 1812, and is reprinted in the present edition.

This treatise is more than a mere law book. It is a monument to the genius of one of the greatest legal reformers of all time. Henry II. came to the throne, after a long period of anarchy, to find countless systems of law administered by a confused and confusing mass of popular courts and feudal courts. He at once set himself to bring order and unity out of anarchy and chaos. He made the King's Court the common court of the land; he determined its jurisdiction as against the church, the lords and the sheriffs; and he made it the guardian of a King's peace, which should protect high and low throughout the whole land. The establishment of peace was in fact the chief object of his stormy career. Glanville's treatise shows us the method he took to secure his object.

By a free use of writs running from the King or his Justiciar, he limited the jurisdiction of all other courts, and subordinated them to the King's Court. By a regular system of removal from lord to county, and from county to King, he secured the gradual unification of the law. The lord's courts had administered the customs of each manor; each county court, too, had its customs, all based upon the Germanic law, but differing materially in the several counties, and especially in the several ancient divisions of the kingdom. The King's Court now began to develop a common law, partly Anglo-Saxon in its origin, partly Norman, but molded largely by Henry's formal or informal legislation, and tempered, as Glanville several times asserts, by equity.

To increase the influence of the King's courts and to bring them to the people, Henry relied on an already existing institution, the *iter* or eyre; but he so improved the system as to make it almost a new invention. The Kingdom was divided into circuits, each made up of a number of neighboring counties; and judges were appointed to ride each circuit, holding a King's court in each county, and thus bringing every part of the Kingdom under the direct control of the King. Glanville himself became one of the first judges of the Northern Circuit.

One of the most important of Henry's provisions for securing the King's peace was the invention of writs for the protection of peaceful seisin, and the prevention of disseisin, even by the true owner. These writs

distraint of the defendant's land. The most important feature of the procedure was the elaborate system of rules governing *essoins* or continuances. By a skilful use of essoins the defendant or tenant could prolong proceedings on a writ of right for years; the fact that in the new possessory assises few essoins were allowed, and the proceedings were therefore much prompter, contributed greatly to the favor with which they were received. Final judgment in the King's court was by this time enrolled; and the method of conveying land by levying a fine was in full operation.

The law of real property in its essential features was fully formed. The whole law of tenures and incidents had been finally settled; but the rules of inheritance and of transfer by will were still uncertain. The doctrines of warranty (now obsolete), according to which the grantor of a party could be called into a suit, or in the technical phrase vouched to warranty, and thus substituted for the original party, were still of the highest importance in practice. The modern mortgage, i. e. the grant on condition, was as yet unknown: Glanville's mortgage of land, like the pledge of personalty in his time, is a mere grant of custody by way of security.

The law of personal property was little developed. Doctrines as to pledge and bailment, derived from the old Germanic law, were applied in the county courts; there, for instance, the absolute responsibility of the bailee was still enforced. Through the writ of detinue and the action on the case, the King's courts were soon

to take control of these subjects, and to establish the modern law of bailments and carriers.

Certain formal contracts were enforced by the King's court. The writ of debt would lie as a result of a loan, a sale, or an obligation created by charter. Redress for breach of ordinary contracts could be obtained only in the ecclesiastical courts, which might deal with the sin of deceit. Not for three centuries did the King's court work out a doctrine by which a party might be held to perform his simple contract.

No action of damages for tort would lie. There is as yet no trace of the process by which (working from appeals of felony to writ of trespass against the King's peace and actions on the case) the King's court would eventually work out the modern law of tort. So far as there was any remedy for torts it was in the inferior courts.

The King's court could at this time punish all felonies except theft, jurisdiction over which it obtained by Magna Charta. It was a long time before it obtained exclusive jurisdiction over felony, or took control, as "custos morum," of misdemeanors.

Such law, it may be admitted, was rude and unsatisfactory; but it was a long advance over what had gone before, and it had within itself the germ of the modern Common Law.

Joseph H. Beale, Jr.

Harvard University,
October, 1900.

THE TRANSLATOR

TO THE

READER.

OF RANULPH DE GLANVILLE, the reputed Author of the following Treatise, Lord Coke speaks in terms of the highest encomium. He informs us, that Glanville was Chief Justice in the Reign of Henry the Second, that he wrote profoundly on part of the Laws of England, and that his Works were extant at that day. "And," continues his Lordship, "in token "of my thankfulness to that worthy Judge, "whom I cite many times in these Re- "ports, (as I have done in my former) "for the fruit which I confess myself to

" have reaped out of the fair field of his " Labors, I will for the honor of him " and of his name and posterity, which " remain to this day (as I have good cause " to know) impart and publish, both to " all future and succeeding Ages, what I " found of great antiquity and of undoubted " verity, the original whereof remaineth " with me at this day, and followeth in " these words: *Ranulphus de Glanvilla*, " *Justiciarius Angliæ, Fundator fuit domus* " *de Butteley, in Comitatu Suffolciæ, quæ* " *fundata erat anno Regis Henrici, filii Im-* " *peratricis, decimo septimo, et anno Domini* " 1171. *quo anno Thomas Becket, Cantu-* " *ariensis Archiepiscopus, erat occisus. Et* " *dictus Ranulphus nascebatur in Villa de* " *Stratford, in comitatu Suffolciæ, et habuit* " *Manerium de Benhall, cum toto Dominio,* " *e dono dicti Regis Henrici. Et duxit in* " *uxorem quandam Bertam, filiam Domini* " *Theobaldi de Valeymz, Senioris domini de* " *Parham: qui Theobaldus per Chartam*

"*suam dedit dicto Ranulpho et Bertæ Uxori*
"*suæ totam terram de Brochous, cum per-*
"*tinentiis, in qua domus de Butteley sita*
"*est, cum aliis terris et tenementis, in libero*
"*maritagio. Prædictus vero Ranulphus*
"*procreavit tres filias de dicta Berta (viz.)*
"*Matildam, Amabiliam, et Helewisam, qui-*
"*bus dedit terram suam ante progressum*
"*suum versus Terram Sanctam.*" The document then proceeds with a minute accuracy to trace our Author's Descendants, and finishes the sketch by informing us—
"*quod præfatus Ranulphus de Glanvilla*
"*fuit vir præclarissimus genere, utpote de*
"*nobili sanguine, vir insuper strenuissimus*
"*corpore, qui provectiori ætate, ad Terram*
"*sanctam properavit, et ibidem contra inimi-*
"*cos Crucis Christi strenuissime usque ad*
"*necem dimicavit.*"[1] The paucity of these facts may be, in some measure, remedied, by consulting the Annals of our Second

[1] Co. 8. Rep. pref.

Henry, where the name of Glanville not unfrequently occurs. We hear of him in 1171, as Fermour of the Honor of Earl Conan :[1]—in 1172, as having the custody of that Honor, and the Fair of Hoiland;[2]—and in 1174, as still retaining the same Honor, and accounting for the Capture and Ransoms of Prisoners, &c. taken in War.[3] In the latter year he is said to have distinguished himself, as the General who took the King of Scotland Prisoner.[4] In 1175, he still retained the Honor of Earl Conan,[5] and filled the Office of Sheriff of Yorkshire.[6] In 1176, he was made a Justice of the King's Court, and a Justice Itinerant.[7] In the same year, he accounted for Westmoreland by the hands of Reiner, his Dapifer or Steward, a privilege conceded to the great alone.[8]

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[1] Madox's Exch. 439.
[2] Ibid. 203.
[3] Ibid. 253.
[4] Hume's Hist.
[5] Mad. Exch. 297.
[6] Ibid. 87.
[7] Hoveden, p. 600.
[8] Mad. Exch. 662.

In 1180, he was made Chief Justiciary of all England, as we are informed by his cotemporary Roger Hoveden, whose words are too remarkable to be omitted. *Henricus Rex Angliæ pater constituit Ranulphum de Glanvilla summum Justiciarium totius Angliæ, cujus sapientia conditæ sunt leges subscriptæ, quas Anglicanas vocamus.*[1] The Chief Justiciary, presided in the *Curia Regis* next to the King, as Chief Judge in all civil and criminal questions; and governed the Realm like a Vice-Roy, when the King was beyond Sea, an event of frequent recurrence in that age. In fine, this officer was invested with a power that placed him far above every other subject. No sooner had Glanville arrived at this elevated post, than he exerted himself to restore and confirm many ancient Laws calculated for the good of the Realm.[2] How much to the satisfaction of

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[1] Hoveden, p. 600. n. 40.

[2] Mad. Exch. 24.

Henry the Second Glanville filled this arduous situation, we may infer, from finding additional honors heaped upon him by that able and politic Prince. In 1183, our Author held the place of Dapifer to the King,[1] and, in the same year, he was appointed Fermour of Yorkshire:[2] situations, it is to be presumed, not incompatible with that of Chief Justiciary, which he appears to have retained, until the death of Henry the Second,[3] and that with undiminished honor, if we except the imputation cast upon him for condemning Sir Gilbert de Plumptun to death, but which seems to be refuted by the confidence continued to be reposed in him by the discerning Henry.[4] Immediately after the death of that Prince, he assumed the Order of the Cross, and perished fighting

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[1] Mad. Exch. 85.
[2] Ibid. 225.
[3] Leg. Anglo-Sax. p. 339.
[4] Hoveden, p. 622, 623. Note 10.

valiantly at the Siege of Acon in the year 1190.[1]

But, whether the same identical person successively occupied these various situations, and, at different periods of his life, filled the rather opposite and inconsistent characters of an able General and a profound Lawyer—a skilful Courtier and an enlightened Legislator, is a doubt which has been entertained by some very respectable Writers. Nor has it passed without a question, whether the present Treatise was really composed by the person whose name it bears. Lord Littleton, indeed, is inclined to infer, that it was not written by Glanville, but by some Clergyman under his direction.[2] These doubts may serve to evince the ingenuity of those who have suggested them, but they prove nothing. When the various situations

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[1] Spelm. Gloss. ad voc. Justitia; and Plowden, 368. b.

[2] Hist. Hen. II.

Glanville is stated to have filled are represented as incompatible, and we start at beholding the grave Lawyer divest himself of his robes to girt on the armour of the soldier, we forget the manners of the age when Glanville florished. When we suppose, that because the work is composed in Latin, it was not written by a Layman, we beg the question: and, having assumed, that no Layman, whatever his parts, whatever his application, could have been sufficiently skilled to write such Latin as our Author has employed, we pay but a sorry compliment to the age, and rather too hastily conclude that we have proved, what, indeed, we have merely taken for granted. When, in fine, we infer, that the knowledge of Law displayed in the Work, and the labor consumed in composing it, are no less inconsistent with the high and elevated station of Glanville, than incompatible with his employments, we forget, that his rise was progressive, and

that, as there are but few things to which a truly great mind is inadequate, the production of a small volume upon that Law which it was daily in the habit of dispensing, ought not, whatever the merit of the work may be, to be ranked amongst the number. It must not, however, be concealed, that Mr. Selden mentions a circumstance which, at the first glance, appears to go a great way in determining the question. "I know the authority of "that Treatise," says he, in speaking of the present work, "is suspected, and "some of the best and ancientest copies "having the name of *E. de N.* which I "have heard from diligent searchers in "this kind of Learning affirmed to have "been sometimes *E. de Narbrough*, and "not *R. de Glanvilla*, it hath been thought "to be another's work, and of later time. "But as, on the other side, I dare not "be confident that it is Glanville's, so I "make little question, that it is as ancient

" as his time, if not his work. The *teste* " of the precedents of writs under his " name, the language, especially the name " of *Justitia* always for that which we now " from ancient time called *Justiciarius*, " (and *Justitia* was so used in writers under " Henry the Second) and the Law deli- " vered in it tasteth not of any later age." [1] Though the latter part of this Extract may be reasonably thought to furnish a sufficient answer to the doubt expressed in the former part, the Translator cannot but observe upon the singularity, that none " of the best and ancientest copies " are forthcoming in support of the fact they are said to prove.

With respect to the Work itself now submitted to the Public in an English dress, it is said to be the first performance that has any thing like the appearance of

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[1] Selden. opera omnia. 1669.

a Treatise on the subject of Jurisprudence, since the dissolution of the Roman Empire.[1] But this is not correct, if the Assises of Jerusalem, compiled, as we are informed in the preamble, in 1099—the System of Feudal Law, composed by the two Milanese Lawyers in 1150, and the *Decretum* of Gratian, published about the same time, be considered as Treatises on Law. It seems, however, to be unquestionable, that the present Treatise is the earliest and most ancient work on the subject of English Jurisprudence, from which any clear and coherent account of it is to be obtained. Dr. Robertson, indeed, informs us, " that in no country of Europe was there " at that time, any collection of Customs, " nor had any attempt been made to render " Law fixed. The first undertaking of that " kind was by Glanville, Lord Chief Justice " of England, in his *Tractatus de Legibus*

[1] See 1. Reeves's Hist. Eng. Law. 223.

"*et consuetudinibus*,[1] composed about the "Year 1181."[2]

It has been thought, that Glanville drew up this compendium of the Laws of England for the public use, by the express command of Henry the Second, a conjecture which, Mr. Madox observes, is not only favored by a certain MS. remaining in the Library of *Corpus Christi* College, Cambridge, written in a hand of the age of Edward the Second, in which there is a Treatise entituled *Leges Henrici Secundi*, agreeing in many passages with the printed copy of Glanville, but also by the manner of our Author's writing, especially in the Prologue.[3] There is also in the Cottonian collection a MS. of Glanville, which bears the Title of *Laws of Henry the Second*. But Mr. Reeves informs us, this manner

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[1] Robertson's Charles 5. Vol. 1. p. 296.

[2] Vide Infra p. 198. Note 2.

[3] Madox's Exch. 123. and Note.

of entituling Treatises was not then uncommon.[1]

The present work appears to have remained in MS. until the Year 1554, when, as Sir Edward Coke apprises us, it was, by the persuasion and procurement of Sir William Stanford, a grave and learned Judge of the common Pleas, first printed.[2] With many peculiar circumstances, however, to create an Interest in its favor, the fate of the work has been most singular. Indebted to its intrinsic merit alone for the high compliment it has long enjoyed, in being looked up to as an authority from which there was no appeal, curiosity has given way to an opinion, that whilst it was venerable for its antiquity, it was also useless, for it was obsolete. That many parts of it are obsolete, it would be idle to deny; but that the work itself is

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[1] Reeves's Hist. Eng. Law. 1. 213.

[2] 4 Inst. 345.

by no means so entirely obsolete as generally assumed, will be fully evident to every impartial and candid Reader. But were it entirely obsolete, it would not necessarily follow, that it would be useless, the terms not being, at least in the science of Jurisprudence, either convertible or synonymous, however fashionable, or, more properly speaking, convenient it may be to esteem them such. *Multa ignoramus quæ nobis non laterent, si Veterum lectio nobis esset familiaris.* The Law of Modern Times is intimately connected with that of our Forefathers, and the decisions of the present day are not unfrequently built upon principles that are enveloped in the almost impervious mist of far distant ages. But to these principles must the Student ascend, if he would merit the name of a Lawyer; and, if the labor be severe, he must reconcile it to himself by reflecting, that it was submitted to by a Coke, a Hale, a Blackstone. Led by the soundness of

their judgments, to investigate the earlier ages of our Jurisprudence, those great men considered nothing useless, though it possibly might happen to be obsolete, which tended to enlighten their minds, and shew them the fundamental principles of those Laws, which they afterwards no less admirably illustrated, than ably administered. But the brightness of the example instead of exciting emulation seems to have depressed it: and Glanville, Bracton, and Fleta have been suffered to crumble on the shelf, whilst Edition has rapidly followed Edition of those more modern Authors, who have advocated their cause, by drawing so deeply from the rich and inexhaustible mines, which their pages present to the English Lawyer.

It remains to speak of the Translation now submitted to the Public. Fidelity has been the principal object of the Translator. If more be demanded, he would shelter

himself under the high name of Sir William Jones. "Elegance, on a subject so deli- "cate as Law, must be sacrificed, without "mercy, to exactness." Next to fidelity, simplicity has been aimed at, as most in unison with the original, and, perhaps, the best adapted for transfusing its spirit into the English Language. Not that with these two objects immediately before him, the Translator would be understood as conceding, that he has sacrificed any beauty, any elegance of expression generally abounding in, or spread over, the original work. He could not sacrifice that which never existed. The style of Glanville, destitute of every grace, and dry and harsh in the extreme, professedly aims at the peculiar qualities which characterise it. *Stilo vulgari et verbis curialibus utens ex industria, ad notitiam comparandum eis, qui hujusmodi vulgaritate minus sunt exercitati*, are the very terms in which he describes his own manner of writing. So successfully has he

accomplished his object, that he imposes upon his Translator a Task not altogether unlike that of acquiring a new language. Yet to these difficulties the Translator reluctantly alludes, for though they may, in some measure, atone for those errors into which he is apprehensive he has often fallen, he is conscious, the merit of his attempt is not to be estimated by its arduousness, but its utility.

With respect to the Annotations, it was the Translator's original intention to have confined himself to a mere explanation of the obsolete Terms. But, anxious to render the work more extensively useful, he has not unfrequently departed from his first design. Among the works occasionally referred to, the Reader will recognise the Regiam Majestatem—so termed from the words with which it commences. This work has been sometimes received, as containing the genuine ancient Law of Scot-

land—sometimes rejected, as a mere spurious fabrication. Among the names in collision on this point are those of Skene, Erskine, Lord Kaims, Houard, Dalrymple, Craig, Lord Stair and Dr. Robertson. Nor has there been less dispute whether Glanville, or the Regiam Majestatem be the original work. But this question is said to be satisfactorily disposed of by Mr. Davidson, who has published a pamphlet expressly on the subject, and has proved, if it were necessary to prove, what is rendered indubitable by the internal Evidence of the two Works, that Glanville is the original; observing, at the same time, "that Glanville "is regular, methodical, and consistent "throughout; whereas the Regiam Majes-"tatem goes out of Glanville's method for "no other assignable reason, than to dis-"guise the matter, and is thereby rendered "confused, unsystematical, and in many "places contradictory." The Translator has not been able to meet with Mr. David-

son's work, but is indebted to the preface attached to the last Edition of Glanville for this Summary of it. "To this observa-
"tion upon the method of the Regiam
"Majestatem," says Mr. Reeves, "it may
"be added, that, on a comparison of the
"account given of things in that and in
"Glanville, it plainly appears, that the
"Scotch Author is more clear, explicit,
"and defined; and that he writes very
"often with a view to explain the other,
"in the same manner in which the writer
"of our Fleta, explains his predecessor
"Bracton. This is remarkable in number-
"less instances all through the Book, and
"is, perhaps, as decisive a mark of a copy
"as can be. The other Scotch Laws,
"which follow the Regiam Majestatem in
"Skene's collection, contribute greatly to
"confirm the suspicion. These, as they
"are of a later date than several English
"Statutes which they resemble, must be
"admitted to be copied from them; and

" so closely are the originals followed, that " the very words of them are retained. " This is particularly remarkable of the " Reign of Robert the Second, in which is " the Statute of *quia Emptores*, and others " plainly copied from our Laws, without " any attempt to conceal the imitation. " These Laws, at least, can impose upon " no one; and when viewed with the " Regiam Majestatem at their head, and " compared with Glanville and the English " Statute Book, they seem to declare very " intelligibly to the world, that this piece " of Scotch Jurisprudence is borrowed from " ours."[1] Nor is the enlightened and liberal Historian Dr. Robertson more favorably disposed towards that claim, which some of his countrymen have put in, for the originality of the Regiam Majestatem. " The Regiam Majestatem ascribed to " David the first seems," he observes, " to

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[1] Reeves's Hist. Eng. Law 225.

" be an imitation and a servile one, of
" Glanville. Several Scottish Antiquaries,
" under the influence of that pious credu-
" lity, which disposes men to assent with-
" out hesitation to whatever they deem for
" the honor of their native country, con-
" tend zealously, that the Regiam Majes-
" tatem is a production prior to the Trea-
" tise of Glanville; and have brought
" themselves to believe, that a nation, in a
" superior state of improvement, borrowed
" its Laws from one considerably less
" advanced in its political progress. The
" internal Evidence (were it my province
" to examine it) by which this theory might
" be refuted is in my opinion decisive.
" The external circumstances, which have
" seduced Scottish Authors into this mis-
" take, have been explained with so much
" precision and candor by Sir David Dal-
" rymple, in his Examination of some of
" the arguments for the high antiquity of
" the Regiam Majestatem, Eding, 1767.

" 4to, that it is to be hoped, the contro-
" versy will not be again revived." [1]

In dismissing this subject, it may be remarked in the words of Mr. Reeves, that it seems unnecessary to contend for the originality of the Regiam Majestatem, whilst a doubt of much more importance remains unsettled—whether that Treatise, as well as the others in the publication of Skene, are now, or ever were, any part of the Law of Scotland, on which, as we have already observed, so many eminent men differ. On the other hand, the authenticity of Glanville, as the code of Law existing in this country during the Reign of Henry the Second, has been admitted, either expressly or impliedly by all the English Lawyers, who have florished in the long interval which has elapsed from that period to the present, and never has been questioned, if we except a solitary *dictum*,

[1] Hist. Charles 5. Vol. 1. p. 296.

which, as it equally affected the credit of Bracton, and was totally unauthorised, is refuted by a thousand circumstances, if it were an object to mention them.[1] But to return from this digression.

Though the Translator had not the good fortune to meet with Mr. Davidson's Pamphlet, he was more successful in discovering Skene's translation of the Regiam Majestatem, deposited in Lincoln's Inn Library. The Translator intended to have noticed such parts of the Regiam Majestatem, as coincided with Glanville. But, after having, with some attention, perused the former Book, he found the similarity between the two works so very general, and the correspondence so exact, that the Regiam Majestatem might frequently be taken as a verbal Translation of Glanville, or, at least, as another Edition of the same Treatise, in

[1] Plowd. 357.

which the writer had made some slight additions and alterations, and had capriciously amused himself in contriving an arrangement totally different, though far less happy and systematical. The Translator has, therefore, generally contented himself with noticing those deviations between the two works, which were more immediately relevant to his subjects. Nor has he always stopped here, but has availed himself of the Regiam Majestatem, whenever it was less ambiguous, or more decided than Glanville, which from the very circumstance of its being a *posterior* publication, it sometimes naturally will happen to be. In addition to the Regiam Majestatem, reference has been occasionally made to the Grand Custumary of Normandy, Bracton, Fleta, Britton, Coke, Hale, &c. &c. Some of these references serve to corroborate—some to illustrate the Text: some tend to shew that a Law was not peculiar to this Country, and some that a similar

Rule has been adopted even in Modern Times by a neighboring State. In consulting the Laws of that state, and noticing those instances of strong or faint resemblance between them and the Code of Henry the Second, the Translator acted in deference to the suggestions of a Gentleman, who, though possessed of the most profound legal knowledge, is yet more entitled to our admiration for his singular liberality of sentiment, and urbanity of manners. If the more enlightened mind derive no benefit from the plan which has been adopted in the notes, and anticipate the Result; yet, it is hoped, the Student may receive some advantage from it. But, if the Translator has been too diffuse in some instances, he has, on other occasions, contented himself with a bare reference. He has been averse to swell the Notes, where a bare citation would serve to direct the Student, if disposed to extend his inquiries. In addition to the Translator's own Notes, the Reader is fur-

nished with a few annotations extracted from a copy of Glanville, formerly belonging to Mr. Justice Aland, and now deposited in the collection of the Royal Institution. Yet, should it be observed, it is not perfectly clear whether these annotations were made by that learned Judge, or by the Reverend Mr. Elstob, a gentleman deeply versed in Anglo-Saxon Literature. By way of distinction, these Annotations are particularised by (Al. MS.)

In order to render the work as complete as the limited ability of the Translator would allow, he has subjoined the more important, and only the more important various Readings, as furnished by the Bodleian, the Cottonian, the Harleian and Dr. Milles's MSS. The MS. of Glanville deposited in Lincoln's Inn Library has not been consulted.

The Translator concludes these cursory observations with a brief summary of the

contents of Glanville, availing himself, in some measure, of that contained in Mr. Reeves's History.

Our Author *in general* confines himself to such matters only as were the objects of jurisdiction in the *Curia Regis*, and divides his work into fourteen Books. The two first of which treat of the Writ of Right, when originally commenced in the *Curia Regis*, and of all its stages, the Summons — Essoins — Appearance — Pleadings—Duel or Grand Assise—Judgment and Execution. The Third speaks of vouching to Warranty, which with the two former Books, comprises a lucid account of the proceedings in a Writ of Right for the recovery of Land. The fourth Book is employed upon rights of Advowson, the fifth upon Villenage, and the sixth upon Dower. The seventh treats upon Alienation, Descents, Succession, Wardship, and Testaments. The eighth is upon final Concords,

and Records in general. The ninth is upon Homage, Relief, Fealty, Services, and Purprestures. The tenth treats of Debts and matters of Contract; and the eleventh upon Attornies. Having thus disposed of Actions commenced originally in the *Curia Regis*, our author, in his twelfth Book, speaks of Writs of Right, when brought in the Lord's Court, and the manner of removing them from thence to the County Court and *Curia Regis*, which leads him to mention some other Writs determinable before the Sheriff. In his thirteenth Book, he treats of Assises, and Disseisins. The last Book is wholly taken up in discussing the doctrine of Pleas of the Crown.

JOHN BEAMES.

It was intended to have added the names of all those Gentlemen, who subscribed for the work. But the list having been consumed in the fire which destroyed Mr. Reed's Premises, and many of the names having been thereby lost, it is become impossible.

PREFACE.

THE Regal Power should not merely be decorated with Arms to restrain Rebels and Nations making head against it and its realm, but ought likewise to be adorned with Laws for the peaceful governing of its Subjects and its People.[1] With such felicity may our Most Illustrious King conduct himself, in the periods both of Peace and of War, by the force of his right hand, crushing the insolence of the violent and intractable, and, with the sceptre of Equity, moderating his Justice towards the humble and obedient, that as he may be always

[1] The introductory part of this Preface is in imitation of that of Justinian's Institutes, and seems strangely to have taken the fancy of the law writers of the age, since Glanville is more or less followed by the Regiam Majestatem, Bracton and Fleta.

victorious in subduing his Enemies, so may he on all occasions shew himself impartially just in the government of his Subjects. But how gracefully—how vigorously—how skilfully, in counteracting the malice of his Foes, our Most Excellent King has, in the season of hostility, conducted his Arms, is manifest to all: since his fame has now spread over the whole World, and his splendid actions reached even the confines of the Globe. How justly—how discreetly—and how mercifully—he, who loves Peace and is the Author of it, has conducted himself towards his subjects in the time of Peace, is evident, since the Court of his Highness is regulated with so strict a regard to Equity, that none of the Judges have so hardened a front, or so rash a presumption, as to dare to deviate, however slightly, from the path of Justice, or to utter a sentence, in any measure contrary to the truth. For there, indeed, the power of his adversary oppresses not

the poor Man, nor does either the favor or credit of another's Friends, drive any person from the seat of Judgment. Since each decision is governed by the Laws of the Realm, and by those Customs which, founded on reason in their introduction, have for a long time prevailed; and, what is still more laudable, our King disdains not to avail himself of the advice of such men (although his subjects) whom, in gravity of manners, in skill in the Law and Customs of the Realm, in the superiority of their wisdom and Eloquence, he knows to surpass others, and whom he has found by experience most prompt, as far as consistent with reason, in the administration of Justice, by determining Causes and ending suits, acting now with more severity, and now with more lenity, as they see most expedient.[1] For the

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[1] "On these last words," says Lord Littleton, "I would "observe, that, as in those days there was was no distinct "Court of Equity, the Judges of the King's Court had "probably a power of mitigating in some cases the rigour

English Laws, although not written, may as it should seem, and that without any absurdity, be termed Laws, (since this itself is a Law—that which pleases the Prince has the force of Law[1]) I mean, those Laws which it is evident were promulgated by the advice of the Nobles and the authority of the Prince, concerning doubts to be settled in their Assembly. For, if from the mere want of writing only, they should not be considered as Laws, then, unquestionably, writing would seem to confer more authority

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" of the Law." (Hist. of Life Hen. 2. Vol. 3. p. 315. Oct. Ed.) A strong instance in point the Reader will find in L. 7. c. 1. or the present Translation p. 149.

[1] This principle, the very basis of despotism occurs in the Roman code. (Justin. Instit. L. 1. t. 2. s. 6.) It may very justly be questioned, whether it is not here cited ironically. At all events, the passage of our text can scarcely warrant the conclusion the celebrated M. Houard has drawn from it. But the Reader shall have his own words—*Le Texte de notre Auteur prouve qu'après la conquête, les Anglois reçurent, de Guillaume le Bâtard, les mêmes Maximes que nous avions jusques-là suivies, à l'égard du Droit exclusif, que nos Rois avoient toujours exercé, de faire les Loix.* (Traités Sur les coutumes Anglo-Normandes par M. Houard. 1. 378.)

upon Laws themselves, than either the Equity of the persons constituting, or the reason of those framing, them. But, to reduce in every instance the Laws and Constitutions of the Realm into writing, would be, in our times, absolutely impossible, as well on account of the ignorance of writers, as of the confused multiplicity of the Laws. But, there are some, which, as they more generally occur in Court, and are more frequently used, it appears to me not presumptuous to put into writing, but rather very useful to most persons, and highly necessary to assist the memory. A certain portion of those I therefore intend to reduce into writing, purposely making use of a vulgar style, and of words occurring in Court, in order to instruct those who are less accustomed to this kind of vulgarity. In proof of which, I have distinguished the present work by Books and Chapters.

Book I.

OF PLEAS WHICH BELONG TO THE KING'S COURT, OR TO THE SHERIFF; AND OF ESSOINS; AND OTHER PREPARATORY STEPS USUALLY RESORTED TO IN SUITS, UNTIL BOTH PARTIES APPEAR TOGETHER IN COURT.

CHAP. I.

Pleas are either Criminal or Civil.[1] The former are divided into such as appertain to the King's Crown, and such as belong to the Sheriffs of Counties. These Pleas belong to the King's Crown.[2]

CHAP. II.

The crime which, in legal phrase, is termed that of

[1] "Now, as out of the old Fields must come the new corn, so "our old Books do excellently expound and express this matter, "as the Law is holden at this day; and, therefore, Glanville "saith, *Placitorum aliud est criminale, aliud Civile*, where "*Placitum criminale* is *Placitum coronæ*. and *Placitum civile*. "*Placitum commune*, named in this Statute." (Magna Charta.) (Vide 2 Inst. 21.)

[2] LL. Æthelbyrti, c. 1. 2. 3. 4. 5. &c. (Al. M. S.)

Læse Majesty, as the death of the King, or a sedition moved in the Realm, or Army[1]—the fraudulent concealment of Treasure-trove—The Plea concerning the breaking of the King's peace—Homicide—Burning—Robbery—Rape—the crime of Falsifying,[2] and such other Pleas as are of a similar nature.[3] These crimes are either punished capitally, or with loss of Member.[4] We must, however, except the crime of Theft, which belongs to the Sheriffs of Counties, and is discussed and determined in the County Courts.[5] It also apper-

[1] "The Committers of these Crimes," says the Regiam Majestatem, "may be punished not only for any fact or deed, but also for the intent and purpose." (Reg. Maj. L. 1. c. 1.)

[2] *Crimen falsi*, an expression borrowed from the Civil Law. (Vide Justin. Inst. 4. 18. 7. &c.) Our author explains its import, L. 14. c. 7.

[3] Cap. 2. Hengham Magna, c. 2. p. 7. LL. Canuti R. secul. c. 61. et Somneri Gloss. in voce *emenda*. (Al. MS.)

The Law of Canute alluded to, is in these words: *Irruptio in domum et incendium et furtum manifestum et cædes publica et domini proditio juxta leges humanas sunt inexpiabilia.* (Vide LL. Anglo-Saxon. Ed. Wilkins, p. 143.)

[4] Among the Laws of Canute, are some inflicting the punishment of loss of members. (LL. Cnnuti, c. 15. 33. &c.)

From hence it has been inferred, that Canute first introduced this species of punishment into England.

However that may be, the Conqueror's Law forms too remarkable a feature in his Legislation to be passed over in silence. It forbids the punishments of death and hanging for any crime, but orders, that the eyes of the offenders should be plucked out, or their feet or hands &c. amputated, *ita quòd truncus vivus remaneat in signum proditionis et nequitiæ suæ!!* (LL. Gul. Conq. p. 218. Ed. Wilkins.)

[5] "Theft and manslaughter," says the Regiam Majestatem, "belong to the Sheriff when any certain accuser appears: not "so when those crimes are taken up by *dittay*." (c. 1. L. 1.) "The Sheriff in the Tourn (for that is to be intended) held plea

tains to Sheriffs, in case of neglect on the part of Lords of Franchise, to take cognizance of Scuffles,[1] blows, and wounds, unless the Accuser subjoin to his charge, that the offence was committed against the King's Peace.[2]

CHAP. III.

Civil Pleas are divided into such as are discussed and determined in the King's Court only, and such as fall within the Jurisdiction of the Sheriffs of Counties. In the former Court, are discussed and determined, all such Pleas as concern Baronies, Advowsons of Churches, questions of condition, Dower, when the Woman has been entirely debarred from receiving it; for breach of Fine made in the King's Court; concerning the performing of Homage, and the receiving of

" of Theft," says Lord Coke. But this part of his jurisdiction was taken away by 17. c. Mag. Chart. (Vide 2 Inst. 30—1.)

[1] *Medletis*, or, as in Harl. Cotton. and Bodl. MS. *melletis*. From Bracton it is to be collected, that some instances of this offence fell under the Jurisdiction of Lords of Franchise, and on their default, reverted to the Sheriff; whilst other instances fell under cognizance of the crown, a distinction confirmed by the Reg. Majestatem (vide Bracton, 154. B. Reg. Maj. L. 1. c. 2.) The term is said to be derived from the French *mesler*. (Vide 3 Inst. 66. Spelm. Gloss. and Cowell's Interpreter.)

[2] The Reg. Maj. makes this allegation a ground of the Sheriff's Jurisdiction (L. 1. c. 3.) " In this distinction, between the Sher- " iff's Jurisdiction and that of the King, we see the reason of the " allegation in modern Indictments and Writs, " *vi et armis* " " *of the king's crown and dignity*," " *the king's peace*," and " *the* " *peace*," this last expression being sufficient, after the peace of the " Sheriff had ceased to be distinguished as a separate Jurisdic- " tion." (Vide Reeves's Hist. Eng. Law. 1. 118.)

Reliefs, and concerning Purprestures,[1] and Debts owing by lay persons. These Pleas, indeed, relate to the propriety of the thing only: concerning those which refer to the possession, and which are discussed and decided by Recognitions,[2] we shall speak in their proper place.

CHAP. IV.

To the Sheriffs of Counties these Pleas appertain: the Plea concerning the Right of Freehold, when the Courts of the Lords are proved to have failed in doing justice, the nature of which we shall speak of in another place; and the Plea concerning Villeins-born: such Pleas being, in each instance,[3] sanctioned by the King's Writ.[4]

[1] Our author explains this term, B. 9. c. 11.

[2] *Recognitiones.* Upon the words *facere recognitionem,* Sir Edward Coke thus comments.—"*Cognitio* is knowledge or "knowledgement, or opinion, and Recognition is a serious ac- "knowledgement, or opinion upon such matters of fact as they "shall have in charge, and thereupon the Jurors are called *Re-* "*cognitores Assisæ,*" (Vide Co. Litt. 158. b.) Our author treats largely on Recognitions in the 12th Book, to which we refer the reader.

[3] We learn from Bracton, that the Sheriff was in the habit of exercising Jurisdiction over many Pleas which did *not* belong to him *ex officio;* but, in such cases, he acted by the King's precept, not as Sheriff, but as *Justiciarius Regis,* (Bracton, 154. b.) The distinction is important, and seems not unknown to the Grand Custumary of Normandy. (Vide c. 2.)

[4] *Breve,* a Writ. When causes became so frequent that the king was unable to attend to them, says Craig, he remitted them to the Judge, by means of Instruments containing a brief sum-

CHAP. V.

When any one complains[1] to the King, or his Justices, concerning his Fee, or his Freehold, if the complaint be such as be proper for the determination of the King's Court, or the King is pleased that it should be decided there, then the party complaining shall have the following Writ of summons.

CHAP. VI.

"The King to the Sheriff, Health.[2] Command *A.* "that, without delay, he render to *B.* one Hyde of Land, "in such a Vill, of which the said *B.* complains, that "the aforesaid *A.* hath deforced him; and, unless he "does so, summon him by good summoners, that he be "there, before me, or my Justices, *in crastino post octa-* "*bas clausi Paschæ* at such a place, to show wherefore "he has failed; and have there the Summoners and "this Writ. Witness Ranulph de Glanville, at Claren- "don."

mary of the chief points. Hence the name *Breve.* (Craig. Jus. Feud. L. 2. dieg. 17, §. 24.) So early as Henry the first we find, that *contemptus Brevium* was an offence, subjecting the person guilty of it to be amerced to the king. (LL. Hen. 1. c. 14.)

[1] *Clamat.* Vide Spelm. Gloss. ad voc. Craig. Jus. Feud. L. 2. Dieg. 17. §. 25. and L. 3. dieg. 5. §. 2.

[2] Vide Fitz. Nat. Brev. p. 5. Ed. 1687. As this is the first writ we meet with, it may not be improper to observe, that, in rendering the writs, the Translator has for obvious reasons endeavoured to adhere to the technical phraseology generally used in that species of process.

CHAP. VII.

THE party who is thus summoned either appears at the day appointed, or makes default, or sends a Messenger, or Essoin,[1] or neither. If he neither appear, nor send an Essoin, his adversary, the Demandant, should, on the day appointed, appear before the Justices, and offer to proceed against him in the suit; and he shall thus await in Court during three days. If the Tenant appear not on the fourth day, the summoners being present, and alledging that they had duly cited him, and offering to prove it, according to the course of the Court, another Writ shall Issue to summon the Tenant to appear at the distance of fifteen days[2] at

[1] *Essonium*, an Excuse. Sir Edward Coke derives the term from the French verb *essonier* or *exonier*. He tells us, it is all one with what the civilians call *excusatio*. Sir Henry Spelman mentions the same derivation, and adds, *ex*, *privativum*, *soing*, cura. The Greek word ἐξομνυσθαι has been proposed as another derivation, implying an excuse by means of an oath. The term occurs so early as the Assizes of Jerusalem, (c. 58.) So limited is the doctrine of Essoins in the present day, that it will here suffice to observe, there were five *principal* kinds in the reign of Henry the second; I say principal, because there were necessarily many others of less importance. These, as enumerated by Sir Edward Coke, were; 1. *de servitio Regis*. 2. *In terram sanctam*. 3. *Ultra mare*. 4. *De malo lecti*. 5. *De malo veniendi;* the two last being the same as those *ex infirmitate de reseantisa* and *ex infirmitate veniendi*, so frequently mentioned by our author, in the present book. Essoins are said to have been derived to us from the Normans. (Vide Assises of Jerusalem, c. 58. le Grand Custum: de Norm. sparsim. Bracton, 336. b. et seq. Fleta L. 6. c. 7. Mirror, 117. et seq. 2 Inst. 125. Spelm. Cowell. Les termes de la ley, &c. &c.)

[2] In affirmance of this period of time, see *Articuli super chartas*, c. 15. and Lord Coke's comment. (2 Inst. 567.) The Norman

least, in which Writ he shall be required as well to answer to the original Suit, as for his default in disobeying the first summons.[1] In this manner, three Summonses shall issue; and, if the Tenant neither appear at the third summons, nor send, the Tenement shall be taken into the King's hands, and shall so remain, during fifteen days.

And, if, within that period, he appear not, the Seisin[2] shall be adjudged to his adversary, so that from thenceforth the Tenant shall not be heard, unless in a suit concerning the propriety, and that authorised by the King's Writ of Right.[3] If, however, he appear within the fifteen days, and be desirous of replevying the Tenement, he shall be commanded to appear on the fourth day, and he shall have that which he is legally entitled unto; and thus, if he appear, he may recover

code required the same period to render a summons lawful, Grand Custum. de Norm. c. 49. See also Bracton, 334. a. and Fleta, L. 6. c. 6. s. 11. 12.

[1] It seems from the *Regiam Majestatem*, that if the summons were made by one summoner, in the presence of lawful and sufficient witnesses, it was good. These witnesses were to verify the summons, before the defendant could be compelled to answer. (Reg. Maj. L. 1. c. 6.)

[2] *Seisina* "is borrowed of the French *seisine*, '*possessio*,' and so it signifieth in our common Law." (Cowell ad voc.) *Craig* concludes, that as we had the term, so we had the doctrine from the French. (Craig. de Feud. L. 2. Dieg. 7. s. 1.) Sir Edward Coke and Sir Henry Spelman coincided with Cowell and Craig in the derivation. (Co. Litt.) 17. a. Spelm. Gloss. ad voc.) The term, it seems, was used, both by the canonists and civilians. (Cowell ubi supra: vide also Index ad Anglo-Sax. LL. verb. *saisiare* and references there.)

[3] Vide Bracton, 367. a.

the Seisin. Should he, however, appear at the third Summons, and confess the former Summonses, he shall instantly lose the Seisin, unless he can excuse his default by the King's Warrant, and by the Writ, which he should instantly produce.

CHAP. VIII.

"THE King to the Justices, Health. I warrant *B.* "who was at such a place, by my precept, on such a "day, in my service, and, therefore, could not be pres- "ent before you on that day at your Assizes; and I "command you, that you put him not in default for his "absence that day, nor that he in any respect suffer "loss. Witness, &c." [1]

CHAP. IX.

IF he should deny all the summonses, he shall, as to each of them individually, corroborate his denial with the oaths of twelve.[2] Should it happen on the day

[1] Vide F. N. B. 86. 87. Ed. 1687.

[2] *Duodecimâ manu.* The author of the commentaries renders this expression eleven, besides the principal, an interpretation which is more or less confirmed by the following authorities: Co. Litt. 295. a. 2 Inst. 44, and the Diversity of Courts, p. 324. On the other hand, Les Termes de la Ley, in describing the ceremony as applied to the very object of the text, expressly says, that the principal should be accompanied by twelve. (Ibid. ad voc. *ley.*)

Bracton, when treating of the subject, employs the same ex-

appointed that either of the Compurgators[1] fail, or should the person of either of them be justly excepted to, and the vacancy occasioned by either of these circumstances not be filled up, the Tenant shall, on account of his default, immediately lose his Seisin.[2] But, if the Tenant thus completely disprove the summonses, he shall on the same day answer to the Action.[3]

CHAP. X.

If the Tenant, being summoned, appear not on the first day, but Essoin himself, such Essoin shall, if reasonable, be received; and he may, in this manner, essoin himself three times successively; and, since the

pression, and observes, that the land was not to be replevied, before the tenant had waged his law, nor, if he failed in waging it; and he lays it down, that the Tenant could not wage his Law by means of an Attorney constituted for that purpose, but must do it personally. (Bracton, 366. a. 410. a.) As to the *origin* of waging Law, the reader may consult Cowell ad voc. *Law* and les Termes de la ley *ubi supra* and Bl. comm. 3. 341. &c.

Before we quit this chapter, it may not be amiss to observe, that Sir Edward Coke refers to it to show, that previous to Magna Charta, he that would make his Law in any Court of Record, must bring with him *fideles Testes*. (Co. Litt. 168. b.)

[1] Bracton tells us, that it was not necessary that the compurgators should be of the same rank as their Principal: it was sufficient if they were trust-worthy, and of good characters. (Bracton, 410. a.)

[2] Mr. Reeves observes, that the waging of Law is not mentioned by Glanville, as a mode of proof for the defendant in civil suits. That judicious writer must be understood, as speaking of that proof, which constituted the defence to the Action.

[3] Vide Mirror, c. 4. s. 7. Bracton, 366. a. b. 368. a. b.

causes, on account of which a person may justly essoin himself, are various, let us consider the different kinds of Essoins.

CHAP. XI.

Of Essoins, some arise on account of ill health, others from other sources. Of those Essoins which arise from ill health—one kind is that *ex infirmitate veniendi*—another *ex infirmitate de reseantisa.*[1]

CHAP. XII.

If the Tenant, being summoned, should, on the first day, cast the Essoin *de infirmitate veniendi*,[2] it is in the election of his Adversary, being present, either to

[1] *Reseantisa*, from the French *reseant*, or *resiant*, or when anglicised, resiance, a term which Dr. Johnson explains in his dictionary, as meaning a residence, though, as he remarks, it is now only used in Law. In this, its simple sense, our author has used it, in a subsequent part of his work. (L. 12. c. 7.) Yet it assumes a different meaning, as used by the old English and Scotch Lawyers to denote an Essoin, when it indicated, as Skene expresses it, "a long and old sickness, or a resident, heavy infirmity and sore sickness." (Regiam Majestatem, L. 1. c. 8.) An observation in the margin of our author informs us, that this Essoin was synonymous with that *de malo lecti;* in other words, this Essoin was resorted to on account of such a severe indisposition as necessarily confined a man to his house or bed.

[2] Or *de via Curiæ*, as it is termed in the Norman code. This Essoin was cast, when the party on his way to Court had fallen suddenly sick, and was thereby prevented attending. (Le grand Custum. de Norm. c. 39.)

require from the Essoiner a lawful proof of the truth of the Essoin in question, on that very day,[1] or that he should find pledges, or bind himself solemnly, that at the day appointed he will have his Warrantor of the Essoin; and he may thus Essoin himself three times successively. If, on the third day,[2] he neither appear nor essoin himself, then let it be ordered, that he be forthcoming in proper person on another day; or that he send a fit Attorney in his place, to gain or lose for him. Thus, whoever on the appointed day may appear in the place of the Tenant, offering to undertake his defence, whether authorised by his Letters, or without them, is immaterial, if it be known, that he be allied to the absent Tenant, he shall be received for him in Court, either to gain or lose.[3] It may be asked, what will be the consequence if the Tenant appear at the fourth day, after having cast three Essoins, and warrant all the Essoins? In that case, he shall prove the truth of each Essoin[4] by his own oath and that of another; and, on the same day, he shall answer to the suit. If, on the fourth day, he

[1] "*Or on another*," according to the Cotton. Bodl. and Dr. Milles's MS.

[2] "*Fourth*," according to Dr. Milles's MS. and so it undoubtedly ought to be, as the context evinces.

[3] Vide Infra, L. 11. c. 5.

[4] It should seem, from Bracton and Fleta, that such persons only as were inferior in dignity to Barons, were required to prove the truth of their Essoins by their own oaths. (Bracton, 351. b. Fleta, L. 6. c. 10. s. 15.) By the 19th c. of Marlbridge, even these persons were relieved from the obligation. (2 Inst. 136.)

neither appear nor send an Attorney, let the Tenement be taken into the King's hands, a Writ being issued by the Court for that purpose, directed to the Sheriff of the County, in which such Tenement is situated, which Writ is in the following words :

CHAP. XIII.

" The King to the Sheriff, health. I command you " that, without delay, you take into my hands the half " of the lands in such a will, which *M.* claims, as her " Dower, against *R.* concerning which there is a suit " between them in my Court, and that you make " known the day of the caption to my justices. And " summon, by good Summoners, the aforesaid *R*, that " he be before me[1] or my Justices at Westminster " *a crastino octabus clausi Paschæ in quindecim dies*, " to hear his judgment, and have there the Summoners " and this Writ. Witness Ranulph de Glanville at " Westminster, &c." In addition, let the Sheriff of the County be commanded to take the Essoiners, as Defaulters, and to detain them, and for this purpose the following writ shall Issue :

CHAP. XIV.

" The King to the Sheriff, Health. I command you " that, without delay, you diligently seek, through

[1] Vide Madox's Excheq. c. 8. s. 8.

" your County, *A.* who has falsely Essoined *B.* against " *C.* in my Court, and that you safely keep him, until you " have my other precept. Witness, &c." The Defendant himself shall also, in the mean time, be summoned to appear before the King, or his Justices, to show why he has not warranted his Essoiner, and to answer to the principal suit. Besides, the Pledges of the Essoiners shall be summoned, by the following Writ.

CHAP. XV.

" The King to the Sheriff, Health. Summon by " good Summoners *T.* that he be before me, or my " Justices, at Westminster, in fifteen days from the " Pentecost, to show why he has not had *I.* before me " at Westminster, on such a day, to warrant the " Essoin that *I.* made for him in my Court against *M.* " as he pledged himself to have him. And have there " the Summoners, and this Writ. Witness, &c."

CHAP. XVI.

But, if the Tenant appear within the fifteen days, and be willing to replevy the Tenement, let him be commanded to attend, on a day appointed, that he may then have justice done him; and, if he appear on that day, and find pledges, he shall recover his seisin, and may retain it. If he deny all the Summonses, and

all the Essoins, and disprove them individually with the oaths of twelve, or if he acknowledge the first Summons, and warrant the three Essoins, and save the fourth day by the King's Writ of warranty, which he should forthwith produce, he may also retain his Seisin. But, if the Tenant appear not within the fifteen days, the seisin shall, on the following day, be adjudged to his adversary, so that the Tenant shall never again be heard concerning it, unless by the King's Writ concerning the Right.[1] But the Demandant shall be put into the possession of the Tenement, by the following Writ, directed to the Sheriff.

CHAP. XVII.

"The King to the Sheriff, Health. I command you "that, without delay, you deliver possession to *M.* of "so much land in such a Vill, of which there was a "suit in my Court, between him and *R.*; because the "Seisin of such Land is adjudged to the said *M.* in my "Court, for the default of *R.* Witness, &c."

CHAP. XVIII.

If any one desire to cast the Essoin *de infirmitate*

[1] The severity of this Law was mitigated by 9 Ed. 3. c. 2. whereby none were to lose their land, by reason of *non-plevin*. A note to this effect is inserted in the margin of our Author; but the reference to the chapter is erroneous.

de Reseantisâ, he may thrice do it.[1] Yet should the Essoiner, on the third day preceding that appointed, at a proper place, and before a proper person, present his Essoin. If, on the third summons, the Tenant appear not, the Court should direct, that it may be seen whether his indisposition amount to a languor,[2] or not. For this purpose, let the following Writ issue, directed to the Sheriff.

CHAP. XIX.

"THE King to the Sheriff, Health. I command you "that, without delay, you send four lawful men[3] of "your County to see of the infirmity of which *B.* hath "essoined himself in my Court, against *R.* be a lan- "guor or not. And, if they perceive that it is a lan- "guor, then, that they should put to him a day of one "year and one day, from the day of the view, to ap- "pear before me, or my justices, or that he send a "sufficient Attorney to answer for him. And if they "see that it be not a languor, then, that they put him

[1] "*And by two Essoiners*," according to Cotton: and Dr. Milles's MS.

[2] Skene explains a languor by "a vehement sickness of body, "or of mind." (Reg. Maj. L. 1. c. 8.)

[3] The text is *Homines*. The Translator submits that it should be *milites*, a reading warranted by the latter part of this very writ; and authorised by the concurring testimony of Bracton, Fleta, Grand Custum: of Norm: &c. See also chapter 28. of the present Book—where, a similar object being in view, four *Knights* are directed to be sent.

"a certain day, on which he shall appear, or send a "sufficient Attorney to answer for him. And Sum- "mon, by good Summoners, the aforesaid four Knights, "that they be then there to testify their view, and the "day they put him; and have there the summoners "and this Writ. Witness, &c." It should be observed, that two Essoiners, at least, are necessary to cast this Essoin.

CHAP. XX.

It should also be remarked, that the two first essoins may be cast *de infirmitate veniendi*, and the third *de reseantisâ*.

Should that course be adopted, the Court should send to ascertain, whether the indisposition amount to a languor, or not. If, however, the two first essoins should be *de reseantisâ*, and the third *de infirmitate veniendi*, it shall be ordered as if they were all *de infirmitate veniendi*, because the judgment must always follow the nature of the last essoin.

CHAP. XXI.

Should it upon any of these occasions happen, that the party himself should answer in Court, and whilst he was present, a future day should have been appointed him; if, at that day, he neither come nor

send an Attorney, let his land be taken into the King's hands, and let him be debarred the power of replevying it. And he shall be summoned to appear and hear the judgment at an appointed day—and thus, whether he appear or not, he shall lose the Seisin, on account of his default; because he cannot afterwards deny the summons, unless by the King's Writ, which he should forthwith produce, and by which he may save his default. But although on any of the days appointed for his appearance, the Tenant should answer in Court, if he lawfully depart, he may recur to his three Essoins, unless he has precluded himself by an agreement to waive them. If, on the first day, the party should essoin himself, but, on the second, should neither appear nor essoin himself, let the Sheriff be commanded to attach the Essoiner, as a defaulter, and for this purpose let the foregoing Writ be directed to him.

CHAP. XXII.

But it should be observed, that when a party to a suit has Essoined himself, the Essoiner may also avail himself of a reasonable Essoin. For if any one desirous of casting a reasonable Essoin, should commission a person for this purpose, and the Essoiner meets with some reasonable impediment in the way, by which he is prevented being present at the appointed day, he shall be awaited until the fourth day, as his Principal would

have been; and if within that period he appear, his Essoin shall be received, on whatever day he should come; and he may thus save the days which are past for the same causes for which his principal[1] could.

CHAP. XXIII.

The principal Essoiner is also at liberty, if so disposed, to essoin himself by another Essoiner. In this case the second Essoiner must state to the Court, that the Tenant, having a just cause of Essoin, had been detained, so that he could not appear at the day appointed, neither to lose nor gain, and that, therefore, he had appointed a certain other person to essoin him; and that the Essoiner himself had met with such an impediment, which had prevented his appearance on that day:—and this he is prepared to prove according to the practice of the Court. By these means, such Essoiner shall be received, and a day shall be granted to the Tenant, through the medium of such Essoiner, upon his undertaking to produce his Warrantor on such a given day, when the Tenant ought to guarantee his principal Essoiner, and to prove his Essoin in the usual manner. In the same manner, the first Essoiner is to guarantee the second, unless on the first day he himself has proved his Essoins, upon the requisition of the adverse party.

[1] *The Tenant*, according to Dr. Milles's MS.

CHAP. XXIV.

But if the Tenant, desirous of proceeding in the cause, should, after his Essoin cast in Court and within the fourth day, appear, then, if the day was in the first instance fixed through the intervention of the Essoiner, and the adverse party has under these circumstances left the Court, the Demandánt[1] cannot recover, as he might on the day past.

CHAP. XXV.

There is another species of Essoin; which is permitted from the necessity of the case; and this happens when any one casts the Essoin *de ultra mare*.[2] In that case, if the Essoin be received, the period of forty days, at least, shall be given to the party essoined. But if, by means of this or any other reasonable Essoin, a man would essoin himself for a longer period, the usual course of the Court shall be followed in giving time.

[1] According to the Bodleian MS. it would stand, he (the Tenant) cannot recover, &c.

[2] "There is," says the Regiam Majestatem, "another kind of "Excuse or Essoin which is necessary, that is, when any one is "essoined because he is beyond the water of Forth or of "Spey; and, if this Essoin is found lawful, forty days shall be "granted to him who is excused." (Vide Reg. Maj. L. 1. c. 8.) "The inconveniences resulting from the abuse of the Essoin in our "text were remedied by West. 1. cap. 44. Vide Sir Edward "Coke's Comment. 2 Inst. 251.

CHAP. XXVI.

THERE are other Essoins which eventually may be resorted to, in order to save the four days, or one of them, by means of which Essoins the adverse party should be awaited in Court: as, for Example, a sudden inundation, or any other unexpected event which could not be foreseen.

CHAP. XXVII.

THE service of the King is also another reasonable cause of Essoin,[1] and when this Essoin is proved in Court and allowed, the Suit shall stand over *sine die*, until it appear that the party has returned from the King's service. Hence those who are continually in the King's service, as his Servants,[2] shall not avail them-

[1] And, as this was founded upon a political *obligation*, it did not extend to excuse the Defendant, if in the service of any other person. (Bracton, 336. b.)

[2] *Servientes*. This term was received in many different senses. Sometimes it meant, persons holding military rank—Sometimes, Vassals or Tenants only—Sometimes, Esquires. It is, in this latter sense, that Lord Littleton and Dr. Brady seem inclined to think it was more generally used (Litt. Hist. Hen. 2. Vol. 3. p. 87.) Mr. Selden, however, has, in his Treatise on Titles of Honor, proved, that there were some very material distinctions between the terms, and that they were far from being synonymous. Dr. Sullivan, when he meets with the word in a Law of the conqueror, explains it as meaning "the lower soldiers, not knighted, "who had not yet got lands, but were quartered on the Abbies." (Lectures on Laws of England, p. 266.) Sir John Skene interprets, what I presume is the same Term, as meaning domestic servants. (Reg. Maj. L. 1. c. 8.) This is, I apprehend, the true

selves of this Essoin; but, with respect to their persons, the ordinary course of the Court, and the order of the Law, shall be observed. We must, however, make a distinction, with respect to the foregoing Essoin. The party desirous of availing himself of the Essoin *per servitium Regis*, will either have been summoned by his adversary previously to entering into such service, or he will have entered into such service in the first instance, and have afterwards been summoned.

If he were in the first instance in the King's service, and in the mean time be summoned to answer the suit, the Rule we have above laid down must unquestionably prevail. On the other hand, if a party be impleaded in the first instance, and he afterwards cast the Essoin *per servitium Regis*, it is material to ascertain, whether he act by a mandate of the King, or a general or special precept, and be from necessity in such service, or otherwise. If he were called by a precept of the King into his service, then, indeed, the same Law prevails, as in the former instance. But if, on the other hand, voluntarily and without any such precept, he has recently entered into the King's service, it must be distinguished, whether he has gone beyond sea in that service, or remains within the Realm. If

meaning of the text, notwithstanding that *Servientes*, when connected with the terms *domini Regis*, sometimes meant a particular description of officers, residing in every County, and possessed of an authority, perhaps, not altogether unlike that of Sheriffs or Coroners, after whom, they are enumerated by Bracton. (L. 3. Tr. 2. c. 32.)

he has gone beyond Sea, a respite [1] of forty days, at least, shall be allowed him, but, if he should not return within that period, the accustomed course of the Court, and the order of Law shall be observed. At whatever period he appears in Court, and whether personally, or by his Attorney, he must immediately produce the King's Writ, to warrant his preceding Essoins. But if, on the other hand, the Defendant be within the Realm, and in the service of the King, in that Case it must be regulated by the will and pleasure of the King's Justices, whether a less or a greater period [2] be allowed him to appear and answer, according as it may best suit the King, and may be consistent with the course of Justice.

CHAP. XXVIII.

It may also happen, that a party is essoined in Court, on account of some indisposition by which he is confined in the same Town where the Court is sitting, having arrived there to prosecute his plea. In this case, let the Court direct, that he appear on the mor-

[1] *Respectus*, pro mora, dilatione vel continuatione temporis. In this sense, the term frequently occurs in our old law books. (Vide Reg. Maj. L. 4. c. 20. and Spelm. Gloss. ad voc.) There is in the Register a writ *respectu computi vicecomitis habendo*, for the respiting a Sheriff's accounts. There was also *respectus Homagii*, delaying of Homage. (See Cowell ad voc.)

[2] *Terminum*. "In the Civil Law," says Spelman, "it signifieth "a day set to the Defendant, and in that sense doth Bracton, "Glanville, and some others sometimes use it." (Reliquiæ Spelmannianæ p. 71.)

row; and thus let him be awaited during three successive days—and for this cause, he shall have a delay of three successive days. If, on the third day, he then so essoin himself, then four Knights should be directed by the Court to attend him for the purpose of ascertaining, whether he is in such a state as to be able to make his appearance in Court, or not; and, should they be of opinion that he is able, then, they should command him, to attend in Court, and do that which he ought. But, if they should think him unable, and should testify this to the Court, then shall a reasonable time, a delay of fifteen days at the least, be allowed him.

CHAP. XXIX.

There is also another Essoin, which is sometimes presented in Court—I allude to that, *de esse in peregrinatione.* But here a distinction must be made, whether the party who would thus essoin himself was impleaded before he undertook his Voyage, or not. Because, in the former case, the course of the Court and the order of Justice shall be observed. But, if he was not summoned previously to his beginning his Travels, then again it must be distinguished whether he went to Jerusalem, or to another place. If to the former place, then a year and a day, at least, is generally allowed him; but with respect to other Travels, the time allowed must be regulated by the Will and pleasure of the King, or his Justices, who, keeping in

view the length or shortness of the Journey, are to temper the Rule as they may think proper.[1]

CHAP. XXX.

In the Writ directed to the Sheriff, for the purpose of summoning the party, there is the following clause inserted, "and have there the summoners and this Writ."

When, therefore, the Demandant offers himself in Court on the appointed day, the first inquiry is, whether the Sheriff has the Summoners, and the Writ there present or not; if he have, and the Summons be proved, the Suit must be proceeded in, in the manner we have mentioned. But, if the Sheriff should neither be present on that day, nor appear within the fourth day, to which time the Tenant must be awaited, then let the Sheriff be again commanded by the King's Writ, to summon the Tenant, concerning the principal cause, by a Writ of second Summons, and that he himself appear to shew why he neglected to make the Summons, as enjoined him by the first Writ. The Writ of second Summons contains that which first issued, with the addition of the following clause: "*and be you your-*" *self then there present to shew wherefore you did not*

[1] The Regiam Majestatem lays down the doctrine of Essoins, nearly word for word with Glanville: but adds one species of Essoin not taken notice of by our author—the being absent at a public fair. (L. 1. c. 8.)

"*summon him, as it was commanded you by my other* "*Writ, and have there this Writ, and that other Writ.*" At the day appointed, the Sheriff appearing, either says that he executed the King's precept, or confesses that he has not done it.

Should he acknowledge the latter, then he shall be amerced to the King. But, in this case, the Demandant shall lose his first day, and the Tenant must be again summoned. But should the Sheriff allege that he had injoined lawful Summoners to execute the first Summons—and they, being present, acknowledge the fact, then not only the Sheriff, but the Summoners shall be amerced,[1] if they have not executed such Summons as it was their duty to do; and thus again the first day will become useless to the Demandant.

But if those whom the Sheriff nominated as Summoners, being present, should assert that the Sheriff did not injoin them to summon the Tenant, we must then distinguish, whether the Sheriff delivered his order to them in the County Court, as he always ought to do, (in order that, if the complaint be presented some time before a County Court, the party may be attached until the County Court, and then there may be a full Summons,) or in any other manner. If the Sheriff gave his orders to them in the County Court, and this be properly proved, the Summoners shall be amerced, because they cannot contradict a fact, which

[1] It should rather seem that in Bracton's time the Summoners only would be amerced. (Bracton, 336. a.)

has been transacted in a County Court.[1] But if the Sheriff, being out of the County Court, and less publicly than he ought, injoin them to summon the Tenant, and they deny that he did so injoin them, the Sheriff shall be amerced for not having executed the King's Writ in the manner that he ought. For public Acts of this nature, such as, the injoining Summoners —the taking of Pledges for the prosecuting of Actions —and for Appearances,[2] ought to be publicly transacted, lest concerning these steps, which are merely preparatory to a final determination, a difficulty should arise, in itself the occasion of procrastinating the decision. But if, on the first day, the Summoners should not appear and assert that they had in a legal way executed the first Summons, but should send their Essoiners on the first day, who essoin them, and add, that they had properly executed the first Summons, then the Demandant shall not lose his first day, and they shall be amerced, because they have not appeared at the first day to prove that they had executed the Summons as was injoined them, unless they can excuse their default on that day, by the King's Warrant. We must, however, not forget, that either the one or the other of the Summoners is permitted legally to excuse himself on the first day, and in that case the Demandant shall not lose the day in question.

[1] Because, says Bracton, the County Court has for this purpose a Record (Bracton, 336. a.) The force of Bracton's remark will be seen in the sequel.

[2] *Tam in civili negotio, quam criminali.* (Bracton, 336. a.)

CHAP. XXXI.

We have spoken concerning the absence of the Tenant, when he is merely summoned, and no Pledges are given. But, if the suit be of a nature to make it requisite, that the Tenant should find Pledges for his appearance, and the Justices or the County Court have recorded them, (which happens in the civil matter of a breach of a Final Concord made in the King's Court before the King or his Justices, and in Novel Desseisins) then, if the Tenant neither appear at the first day, nor essoin himself, the Pledges are adjudged to be amerced to the King; and the Pledges shall be increased as to the principal Cause; and thus, should the Tenant absent himself on all the three days, the Suit must be proceeded in; and if at the third Summons he should not appear,[1] let his Tenement be taken into the King's Hands, and retained in the manner before expressed; the Pledges being amerced, who are to be summoned to be present in Court on a certain day, to hear their Judgment. Should, however, the Plea be of a criminal nature, as, for example, concerning a breach of the King's Peace, then, the proceedings must be according to the course of the Law, as in the above case, with this only difference, that as the party is accused,[2] if he fail to appear at the third Summons,

[1] There is in the original a marginal reference to the 44th, for the 45th, chap. of West. the 1st.

[2] "*Rectatus*," ad rectum vocatus. (Spelm. Glossar. ad voc.) *Rectum* not unfrequently meant an accusation.

his body shall be taken, and his Pledges shall be amerced.[1]

CHAP. XXXII.

HAVING discussed those points which more frequently arise, in consequence of the absence of the Tenant, it remains to speak, concerning the Demandant's not appearing. If the Demandant indeed appear not on the first day, he may avail himself of the same reasonable Essoins as the Tenant, and that by the same means.

If, however, he neither appear nor essoin himself, then, the Court should award, that the Tenant, if present, either personally, or by another, as he ought to be, should be unconditionally dismissed. Yet this is not to preclude the Demandant from recovering, under certain restrictions, the same property, if he feel inclined to institute another suit concerning it.

And, if the Demandant be again inclined to implead the same Tenant, it may be questioned, what the Law is in that case, and how his default should be punished? As to this, opinions differ. For some say, he shall lose

[1] *Misericordia*, a fine arbitrarily imposed upon offenders, and so called, says Spelman, *quod lenissima imponitur misericordia*, heavy fines being contradistinguished by the significant term, *redemptiones*. (Gloss. ad voc. see also Co. Litt. 126. b. and Madox's Excheq. c. 14.) In our progress through Glanville, we meet with the *misericordia—misericordia domini—misericordia vice-comitis*, and *misericordia domini regis*—Vide Infra. L. 9. c. 11. et not.

nothing but his Cost [1] and his Expenses, and his first Writ, but not his cause of Action; but merely be obliged again to begin his suit. Others say, that he shall forfeit his Action against the Tenant totally, and irrevocably, and, on account of the contempt he has been guilty of towards the Court, that he shall likewise be amerced to the King. Others again are of opinion, that he must be amerced to the King, and that it afterwards depends upon the King's pleasure, whether he will be admitted again to institute that Action, or reinstated either unconditionally, or subject to certain restrictions. Thus far it will suffice to have treated, where the Action is prosecuted without any Pledges being given. But, if the Demandant find Pledges for prosecuting his Suit and fail to appear, either personally or by another, on the day appointed, then the Tenant shall be unconditionally dismissed. And the Demandant shall lose his Writ, according to the opinion of some, and the whole of his Cost; and his Pledges shall be amerced, as before stated.

But others think, that he shall forfeit his Action,

[1] *Custum.* Sir Edward Coke, in his Commentary on the Statute of Gloucester, observes, that "before that Statute at the "common Law, no man recovered any costs of suit, either in "Plea real, personal, or mixt:" and again, "this Statute was "the first that gave costs," (2 Inst. 288.) In support of this position, he cites the present chapter of our author. It is extremely difficult to discover, how this chapter corroborates Lord Coke's position. Our author merely recites the opposite and floating opinions of others, and drops the subject, without giving any thing like an opinion of his own. Lord Coke's doctrine may be correct; but, assuredly, Glanville cannot be cited as one of the authorities, on which that doctrine is built.

and his Pledges, &c. But this is the consequence when the suit belongs to the Demandant only, as it generally does in civil cases. When, however, the Suit does not belong to him only, but the King has an interest in it, as in a criminal Plea, concerning a breach of the King's peace, then, as the Demandant cannot lose the suit, unless as to himself, but is bound to prosecute it, his Body shall afterwards be imprisoned and kept safely, until he chuses to prosecute his Appeal,[1] and, in addition, his Pledges shall be amerced.

CHAP. XXXIII.

When it happens that the Demandant and Tenant are both absent, then the King or his Justices may at their pleasure, if so disposed, punish both parties, the one for his contempt of Court, and the other for his false claim.

[1] Upon the word *Appeal*, as designating a criminal proceeding, it will suffice to refer those readers not connected with the profession to 4 Black. Comm, p. 312. et seq.

Book II.

OF THE PROCEEDINGS USUALLY RESORTED TO ABOUT, OR IMMEDIATELY AFTER THE COMMENCEMENT OF THE SUIT; AND OF THE DERAIGNING OF THE TENEMENT BY THE DUEL, OR GRAND ASSISE; AND OF THE CHAMPIONS; AND OF THOSE THINGS WHICH APPERTAIN TO THE DUEL OR GRAND ASSISE.

CHAP. I.

When, at last, both the litigating Parties are present in Court, and the Demandant has proceeded to claim the Tenement in question, the Tenant may pray a View of the Land.

But, with respect to the time which should be allowed him for this purpose, a distinction is to be made, whether the Tenant has more land in the Vill, where the Land in question is situated, or not. In the latter case, no delay shall be conceded him: but, if he has more Land in the Vill, further time shall be allowed him, and another day given him to appear in Court.[1]

[1] "After the verification of his Essoins," says the Regiam Majestatem, "he shall have fifteen days for vising and seeing of "the Ground or Land,") (Reg. Maj. L. 1. c. 9.)

If he then depart from Court, he may again avail himself of three reasonable Essoins, and the Sheriff of the County, where the Lands in question are situated, shall be directed to send free men of his County to view the Land, by the following Writ:

CHAP. II.

"THE King, to the Sheriff, Health. I command "you that, without delay, you send free and lawful "men of the neighbourhood[1] of such a Vill, to view "one Hyde of Land in such a Vill, which *M.* claims "against *R.* and of which there is a suit between them "in my Court; and have four of them before me, or "my Justices, such a day, to testify of their view, and "what day they put to him. Witness, &c."

CHAP. III.

AFTER the three reasonable Essoins which accompany the view of the Land,[2] both parties being again

[1] *Visineto*—"It should be *vicineto*. *Vicinetum* is derived of "this word *vicinus*, and signifieth neighbourhood, or a place "near at hand, or a neighbour place. And the reason, where-"fore, the Jury must be of the neighbourhood is for that *vici-"nus facta vicini presumitur scire*," (Co. Litt. 158. b.)

[2] "After three lawful Essoins," says the Reg. Majestatem, "when the parties are passed from the Court to the sight of the "Land, the Pursuer shall beware that he give distinctly the "sight of the same, conformably to the metes contained in the "King's writ. For if he gives the sight thereof otherwise than

present in Court, the Demandant should set forth his demand[1] and claim in this manner: "I demand against "this *H.* half a Knight's Fee or two ploughlands, in "such a Vill, as my Right and Inheritance, of which "my Father, or my Grand Father, was seised in his "Demesne as of Fee in the time of King Henry the "First, or after the first Coronation of our Lord the "King, and from whence he took the profits to the "Value of five shillings at least, as in Corn,[2] Hay, and "other produce; and this I am ready to prove by my "Freeman *I.* and, if any accident happen to him, by "such a one, or by a third" (and the Demandant may thus name, as many as he chuses, but one of them only

"is contained in the King's writ of Right, the writ may be can- "celled as null, and of no avail in the Law." (Reg. Maj. L. 1. c. 9.)

[1] It will not suffice, says Bracton, simply to say, "I demand "such Land, as my right," unless the Demandant make out his right, and shew how, and by what means, it has descended to him. Neither will it suffice to allege, that the Ancestor was seised in his Demesne as of his free Tenement only, or in his Demesne as of Fee only, including, as it does, the freehold and whole possessory right, unless it be added, that he was so seised by right, which comprises the right of Propriety. Nor, again, will these two rights of possession and of propriety, or the *dreit dreit*, suffice, unless the Ancestor held the Land in question in his Demesne; for if he held it in service, it will not answer the purpose. Neither will it suffice, that the Ancestor was seised as of Fee, and in right, and in his Demesne, unless it be subjoined that he took the Esplees; because a momentary seisin is not sufficient, without a taking of the Esplees, to found a Suit touching the right of Propriety. Though all these requisites concur, it was still necessary to add the time of the king. (Bracton, 372. b. 373. a.)

[2] *Bladis* signifieth, says Lord Coke, corn or grain whilst it groweth. (2 Inst. 81.)

shall wage the Duel,[1]) "who saw this or heard it:"[2] or the Demandant may use other words thus—"and this I am ready to prove by my Free-man *I.* to "whom his Father, when on his death-bed, injoined "by the Faith which a Son owes to his Father, that if "he ever heard a claim concerning that Land, he "should prove this as that which his Father saw and heard."[3]

[1] The judicial combat appears to have been the most ancient mode of terminating controversies known to the northern nations in their original settlements. For *Velleius Paterculus*, (L. 2. c. 118) apprises us, that all those questions, which were decided among the Romans by legal trial, were terminated among the Germans by arms. It was introduced into most, if not all, of those European nations, whom the Gothic tribes subdued. In unison with their passion for arms, it was consecrated by their superstition. Countenanced by their Princes, and sanctioned not unfrequently by the Clergy, it long kept its ground. (Montesq. Spirit of Laws.) One of the earliest restrictions of the practice, which is said to occur in history, was that imposed by our Henry the First, but this merely prohibited the Trial by combat, in questions concerning property of small value. (Brussel usage des Fiefs, vol. ii. p. 962.) Louis the Seventh, of France, followed this example, and promulgated a similar law. This was imitated by St. Louis; but his regulations extended only to his own demesnes, (Hist. du France par le Pere Daniel tom. 5. 259.) It was reserved for the steady and masterly hand of our Henry the Second, to give the death blow to the Trial by combat, by the introduction of the Grand Assise—a remedy which, if my memory does not grossly deceive me, is said by Roger Hoveden, to have been invented by Glanville.

[2] The champion was relieved from the necessity of taking an oath, that he had seen or heard the fact, and that his ancestor desired him to deraign it, by the 41. c. West. 1. Until this alteration of the Law took place "it seldom happened," says the act, "but that the champion of the Defendant (it should be De-"mandant, a translation the original French requires) is for-"sworn." (2 Inst. 246.)

[3] It is thus, according to Skene's translation of the Regiam

The demand and claim of the Demandant being thus made, it shall be at the election of the Tenant, either to defend himself against the Demandant by the Duel,[1] or to put himself upon the King's Grand Assise, and

Majestatem—"I sick ane man sayes and proponis against *N.* "that my Father, my guidshir, or my Brother, or Sister, or some "other of my Parentage or kindred, was in the possession of sic "ane Land by the space of certain zieres and dayes; quhilk lyes "in sic ane Towne, be certain meths and marches, betwixt the "Lands perteining to sic ane man: quhilk Land I clame to per- "teine to me heritablie, halden of our Soveraine Lord the King, "or of sic ane other Lord. Payand to him zierlie therefore "sameikill and to others sameikill. Quhilk lands, with the perti- "nents, perteins to me heritablie, be discent, or succession, be "the death of sic ane other of my blude and consanguinitie, as "my awin proper right. The quhilks Lands, with the perti- "nents, the said *N.* be force and unjuslie halds fra me, against "the Law of the Land; to my great shame and skeath of ten "pounds money, mair or lesse. The quhilk gif the said *N.* "denyes. I aske an assise of the indwellers of sic ane Towne or "place; and referres my claim to God, and ane gude assise of "neighbours. Provyding that, na suspect persons passe upon the "said assise. And, mairover, that it sall be lesome to me to "say, mair gif need beis." (L. 1. c. 10.)

[1] "The Trial by Champion in a Writ of Right hath been an- "ciently allowed by the common Law, and the Tenant in a "Writ of Right hath election, either to put himself upon the "Grand Assise, or upon the Trial by combat, by his Champion "with the Champion of the Demandant; which was instituted "upon this reason, that in respect the Tenant had lost his "Evidences, or that the same were burnt or imbezeled, or that "his witnesses were dead, the Law permitted him to try it by "combat between his Champion and the Champion of the De- "mandant, hoping that God would give victory to him that "right had; and, of whose party the victory fell out, for him "was judgment finally given, for seldom death ensued hereupon "(for their weapons were but batounes) victory only sufficed."

Sir Edward Coke then gives the form of the champions oath; and adds. "the champions are not bound to fight but until the "stars appear; and if the Tenant can defend himself until the "stars appear, the Tenant shall prevail." (2 Inst. 246.)

require a Recognition to ascertain, which of the two have the greater Right to the Land in dispute.

If he elect the former mode of proceeding, he must deny the right of the Demandant, word for word as the Demandant has set it forth, and this, either in person, or by some other fit man. But here we should observe, that after the Tenant has once waged the Duel he must abide by his choice, and cannot afterwards put himself upon the Assise.[1] In this stage of the suit, the Tenant may again avail himself of three reasonable Essoins in succession, with respect to his own person and of the same number with regard to the person of his Champion.[2] All the Essoins which can with propriety be resorted to having expired, it is requisite, before the Duel can take place, that the Demandant should appear in Court, accompanied by his Champion armed for the contest. Nor will it suffice, if he then produce any other Champion than one of

[1] *Assisa* is derived, by Cowell, from the French *asseoir*, to sit. The term has a variety of significations. We shall briefly mention some of the chief.—1. It signifieth a Writ, thus assisa of novel disseisin of *Juris Utrum*, &c. 2. It signified a Jury. 3. It meant a statute or law, thus *assisa panis et cervisiæ—assisa de Clarendon*, &c. 4. It is used for the court, place, or time, where writs of assise were taken. 5. It meant a certain number. 6. It imported a tax, or tribute. 7. It was used for a fine. (Vide Spelm. Gloss. Anglo.-Sax. LL. Ed. Wilkins, p. 328.)

[2] *Campionis.* "*Campio dicitur a campo*, because the combat "was strucken on the field, and, therefore is called camp-fight, "and he must be *liber homo.*" (2 Inst. 246.) In this derivation Spelman concurs. The reader may consult the latter if desirous of seeing what he terms *formula campi seu duelli.* (Gloss.)—Also the mirror, c. 3. s. 24. 25. Bracton, the Assises of Jerusalem, Grand Custumary of Normandy, &c.

those, upon whom he put the proof of his claim: neither, indeed, can any other contend for him, after the Duel has been once waged.

But if he who has waged the Duel should, in the interval pending the Suit, happen to die, a distinction is to be made. If he died a natural death, and this is declared by the Vicinage, (as it ought always to be, if there exist any doubt concerning the fact,) the Demandant may in the first place recur to one of those upon whom he placed his proof, or to another proper person, even if he have not named any other, provided that such other be an unobjectionable Witness—and thus the Plea may begin again. If, however, his death was occasioned by his own fault, his Principal shall lose the cause. It may be asked, whether the Champion of the Demandant can substitute another in Court, to make that proof which he took upon himself? According, indeed, to the Law, and ancient custom of the Realm,[1] he cannot appoint any other, unless it be his legitimate Son;[2] and here it may be observed, that the Champion of the Demandant should be such a person as is a proper Witness of the fact. Nor is it lawful for the Demandant to prosecute his appeal in his own person, because it is not permitted unless by the intervention of a proper Witness, who has both heard and seen the fact.

[1] Vide Gul. 1. Instituta Saxonice in textu Roffensi, item Somneri Gloss. ad LL. Hen. in voce *Bellum*. (Al. MS

[2] Vide Mirror, c. 4. s. 11.

But the Tenant may defend himself, either in his own proper person, if he chuse so to do, or by any other unobjectionable Witness, if he prefer that course. But, if he has produced a Champion, and such Champion should die in the interval, it may be asked, what the Law is, whether the Tenant may defend himself by another Champion, or whether he ought to lose his suit, or his seisin only? We must here have recourse to our former distinction. It should also be remarked, that the Champion of the Tenant cannot substitute another in Court for the purpose of undertaking the defence, unless it be his own lawful[1] Son.

But, it frequently happens, that a hired Champion is produced in court, who, on account of a reward, has undertaken the proof. If the adverse party should except to the person of such a Champion, alleging him to be an improper witness, because he had accepted a reward to undertake the proof, and should add, that he was prepared to prove this accusation against the Champion, (if the latter chose to deny it) either by himself or by another, who was present when the Champion had taken the reward, the party shall be heard upon this charge, and the principal Duel shall

[1] The Cottonian, Bodleian, and Dr. Milles's MS. concur in omitting *lawful*, yet, that the true reading is as it stands in the Harleian MS. and in the Text, is more than probable, since the son of the Demandant's champion was to be legitimate, and there can be no reason suggested, why the same rule should not prevail, with respect to the Tenant's champion. The Rule itself most probably resulted from the warlike spirit of the age, and the desire to keep up the dignity of a species of trial, in which noble-men frequently personally engaged.

be deferred. If, upon this charge, the Champion of the Demandant should be convicted and conquered in the Duel, then, his Principal shall lose the suit, and the Champion himself, as conquered, shall lose his law, namely, he shall from thenceforth never be admitted in Court, as a Witness, for the purpose of making proof by Duel, for any other person ;[1] but, with respect to himself, he may be admitted, either in defending his own body, or in prosecuting any atrocious personal injury, as being a violation of the King's Peace. He may also defend by Duel his right to his own Fee and Inheritance.

The Duel being finished, a fine of sixty shillings[2] shall be imposed upon the party conquered, in the name of Recreantise,[3] and besides which he shall lose

[1] From the Norman Code we learn, that the conquered Champion was incompetent as a witness, as a champion, as a juror, &c. (Le Grand Custum. de Norm. sparsim) which indeed coincides with the text of Glanville, in point of substance.

[2] *Qui bellum vadiaverit et per judicium defecerit, 60 Sol. emendet* (LL. Hen. 1, c. 59 Ed. Wilkins.) The Mirror says 40s. and the Cottonian MS. of Glanville 9s. whilst the sum fixed by the Norman code was 40s. and one penny. (Vide Mirror, c. 3. s. 23. Grand Custumary of Normandy c. 127.)

[3] *Recreantisæ.* "Now the ancient law was, that the victory "should be proclaimed, that he that was vanquished should ac- "knowledge his fault in the audience of the people, or pronounce "the horrible word of *cravent*, in the name of *recreantise* &c. and "presently judgment was to be given, and the recreant should "*amittere legem* &c." (2 Inst. 247) "And the vanquished is to "acknowledge his offence, in the hearing of the people, or speak "the horrible word of *cravent*, in the name of *cowardice*, or his "left foot to be disarmed and uncovered, in sign of Cowardice." (Mirror, 162 Ed. 1768. "If he become *recreant*, that is a cry- "ing coward, or craven, he shall for his perjury lose *liberam*

his Law; and, if the Champion of the Tenant should be conquered, his Principal shall lose the Land in question, with all the fruits and produce found upon it at the time of Seisin of the Fee, and never again shall be heard in Court concerning the same Land.[1] For those matters, which have been once determined in the King's Court by Duel, remain for ever after unalterable. Upon the determination of the suit, let the Sheriff be commanded by the following Writ, to give possession of the Land to the successful party.

CHAP. IV.

"The King to the Sheriff, Health. I command you "that, without delay, you give possession to *M.* of one "Hyde of Land, in such a Vill, concerning which there "was a suit between him and *R.* in my Court; because "such Hyde of Land is adjudged to him in my Court, "by the Duel. Witness, &c."

" *legem. Craven* is derived from the Greek word κραυγη, *a vocife-*
" *ratione:* others nearer home of crying and craving forgiveness.
" And *recreantisa* is devised of the French *recreance*, or giving
" back or cowardice; and sometimes it is called *creantia*, per
" antiphrasen, because he that useth it is not faithful but
" breaketh his oath." (3 Inst. 221.)

[1] *Dominus autem pro quo Duellum subierat amittet penitus quicquid per illud intendebat obtinere. Nec aliquid ulterius ipse vel Heredes sui in querelâ contentionis de cetero poterunt reclamare.* (Le Grand Custoum. de Normand. c. 127.)

CHAP. V.

This is the course of proceeding, when the Demandant has been successful in the Duel. But if he has been conquered, in the person of his Champion, then the Tenant shall be freed from his claim, without any possibility of being again disturbed by him. Thus far concerning the Duel,[1] where the Tenant should chuse or elect that mode of defending himself, against his Adversary.

CHAP. VI.

But, if the Tenant should prefer putting himself upon the King's Grand Assise, the Demandant must either adopt the same course, or decline it. If the Demandant has once conceded in Court that he would put himself upon the Assise, and has so expressed himself before the Justices of the Common Pleas,[2] he can-

[1] In taking leave of the trial by Duel, the Reader will recal to mind Judge Blackstone's observation—that, though this species of Trial is much disused, it is still in force, if the parties chuse to abide by it. (3 Comm. 336.)

[2] *Coram Justiciis in Banco sedentibus* is the much controverted passage of the Text. Mr. Reeves conceives it to mean, *before the Justices in open court*, observing, that this phrase has been quoted by some persons to shew, that in the time of Glanville, there were Justices *de banco*, in the modern sense of those words, a construction, he proceeds to remark, which this passage will certainly not warrant. (Hist. Eng. Law, 1. 125. in note.) On the same side with Mr. Reeves we find Mr. Madox, who is, undoubtedly, a very respectable authority, did he not indicate rather too strong an inclination to interpret the passage, in

not. afterwards retract, but ought either to stand or fall by the Assise.

If he object to put himself upon the Grand Assise, he ought in such case to shew some cause, why the Assise should not proceed between them—such as, that they were of the same blood, and sprung from the same kindred stock from whence the Inheritance itself descended; and if the Demandant take this objection, the Tenant will either admit its validity, or deny it. If he admit it in Court, the Assise itself shall thereby cease, so that the matter shall be verbally pleaded and determined in Court; because it is then a question in Law, which of the parties is the nearer to the original stock, and as such, the Heir most justly entitled to the

favor of his own hypothesis. (Madox's Excheq. c. 19.) Lord Hale follows on the same side. "Neither," says he, "do I find any distinct mention of the court of *common* "Pleas in the time of this king,"—speaking of Henry the second. (Hist. Com. Law, p. 142.) This, it must be confessed, is but negative authority; for though it may possibly be contended, that his Lordship viewed the doctrine of the Text in the same light as Mr. Madox and Mr. Reeves view it, yet, it is more probable, that he had forgotten it, or he otherwise would have noticed, if merely to refute, it. As a strong supporter of a contrary doctrine, we find Lord Coke. (2. Inst. 22. See also pref. to 8 Rep. and Co. Litt. 71. b. and Mr. Hargrave's note.) The reasons adduced by Mr. Reeves and those who concur with him, appear by no means conclusive; and I think it would be far from difficult to give a complete answer to them, from considering the style and manner of expression peculiar to our author. But as this is purely a speculative point, at least in the present day, I am not anxious to balance it *in pulvere scholastico*, as Mr. Madox professes to do it, but follow the high authority of Lord Coke, without pretending to assert, that even his opinion may not here be liable to question, so very doubtful is any conclusion which we may come to upon the subject!!

inheritance; and, in this manner, the nearer Heir shall prove his title, unless his adversary can allege in Court any reason, why such Heir has lost his right, either for a time or perpetually, or that any Ancestor of his had so done; as, for Example, that he has given or sold or exchanged the Land in question, or, by any other mode which the Law permits, has alienated it; or if the Heir, or any of his Ancestors, have committed Felony,[1] and forfeited their rights entirely, concerning which we shall treat more fully hereafter. Should the suit on any of these grounds be delayed, the matter may incidentally, through the Effect of Pleading having such a tendency, be regularly brought to the Duel. But if he, who has put himself upon the Assise, deny all Relationship between him and the Demandant, or, at least, insist, that they were not sprung from the same stock, from which the Inheritance descended, then, recourse must be had to the[2] common Kindred of both parties, who for this purpose are to be called into Court, in order that the Relationship of the parties to the suit may be investigated on their testimony. If the Relations unanimously affirm, that the

[1] Vide Bracton, 130. s. 19, 20.—Fleta 43. s. 4. and Britton c. 5. s. 7. and Infra, L. 7. c. 17. &c.

[2] But the Cottonian and Dr. Milles's MS. concur in stating it to be, *to the Vicinage*. That the printed text of Glanville is correct, seems unquestionable, as he mentions a reference to the Vicinage, after that to the kindred had failed. All this is clear: but according to the MS. alluded to, a reference must be made to the Vicinage, after the Vicinage, which is assuredly absurd. To this may be added, that the printed text corresponds with another part of Glanville, where an object, not altogether dissimilar, is in view. Vide L. 5. c. 4.

litigating parties have descended from the same stock, from whence the Inheritance moved, their assertion is conclusive, unless one of the parties strongly persist in asserting the contrary; and, in such case, recourse shall be had to the Vicinage, whose testimony upon this subject, if it coincide with that of the Relations, must be unreservedly acquiesced in. The same course must be pursued, if the Relations differ in their Testimony; for then the parties must abide by the Verdict of the Vicinage. The Inquisition having been made, if the Parties be unquestionably found and proved to have sprung from the same stock, from which the Inheritance descended, the Assise shall cease, and the suit must verbally proceed, as I have before mentioned. But, if the contrary should appear to the Court and the King's Justices, then, the Demandant who took the objection, that both parties were sprung from the same stock, in order maliciously to prevent the Assise, shall lose his suit. If nothing intervene to impede the progress of the Assise, then the question shall be as finally terminated by that mode of decision as by the Duel.

CHAP. VII.

THE Grand[1] Assise is a certain royal benefit be-

[1] Mr. Reeves thinks the term *magna* in the present passage an interpolation, because the Cottonian, Bodleian, and Harleian MS. omit the word. It is with reluctance I differ from a writer, to whom the profession is under such very considerable obligations—but I submit. 1st, That the word *magna* had occurred in the preceding chapter, and all these MS. had concurred in ad-

stowed upon the people, and emanating from the clemency of the prince, with the advice of his nobles. So effectually does this proceeding preserve the lives and civil condition of Men,[1] that every one may now possess his right in safety, at the same time that he avoids the doubtful event of the Duel. Nor is this all: the severe punishment of an unexpected and premature Death is evaded, or, at least the opprobrium of a lasting infamy, of that dreadful and ignominious word[2]

mitting it. 2ndly, That the connection of the subject shews the Assise spoken of in the two places, to be one and the same proceeding. 3rdly, That in numberless other passages our author characterises this Assise by the term *magna*, and most, if not all, of the MS. admit it in such passages. 4thly, That the Regiam Majestatem, the Mirror, the Diversity of Courts, Bracton, Fleta, Lord Coke, Judge Blackstone, Cowell, Spelman, Madox, and many others, always speak of this proceeding under the term *Grand* Assise; and lastly, that as the word *assisa* had a variety of meanings, it seems no less consistent with clearness of expression, than compatible with the dignity of a proceeding, intended in its object to effect so remarkable a revolution in our judicial polity, as the abolishing of the Duel, to attach some honorable term of distinction to it.

1 *Status integritati tam salubriter.* Our Author alludes to the consequences that befel the conquered champion: he lost his life, or his *law* &c. But, in losing his law, his condition or state in society, as a civil character, was affected, being no longer capable of waging the Duel for another &c. The Assise, says he, is so regardful of the lives of men—of their condition, as civil Beings, that it exposes neither the one nor the other to any danger.

The whole chapter is sufficiently crabbed and quaint; indeed, the most difficult parts of the whole work are those in which the author has aimed at being elegant.

This observation applies with particular force to our Author's Preface.

2 See Note page 40.

that so disgracefully resounds from the mouth of the conquered Champion.

This legal Institution flows from the most profound Equity. For that Justice, which, after many and long delays, is scarcely, if ever, elicited by the Duel, is more advantageously and expeditiously attained, through the benefit of this Institution. This Assise, indeed, allows not so many Essoins as the Duel, as will be seen in the sequel. And by this course of proceeding, both the labor of Men, and the expences of the poor are saved. Besides, by so much as the testimony of many credible witnesses, in judicial proceedings, preponderates over that of one only, by so much greater Equity is this Institution regulated than that of the Duel. For since the Duel proceeds upon the testimony of one Juror, this constitution requires the oaths of twelve lawful men, at least. These are the proceedings which lead to the Assise. The party who puts himself upon the Assise should, from the first, and in order to prevent his Adversary from subsequently impleading him, sue out a Writ for keeping the peace, the suit being already pending between the parties concerning the Tenement, and the Tenant having put himself upon the Assise.

CHAP. VIII.

"The King to the Sheriff, Health. Prohibit *N.* "that he hold not in his Court the Plea which is be- "tween *M.* and *R.* of one Hyde of Land, in such a

"Vill, which the said *R.* claims against the aforesaid "*M.* by my Writ, unless the Duel be waged; because "*M.* the Tenant hath put himself upon my Assise, "and prays a Recognition to be made, which of "them have the greater right to that Land. Wit- "ness &c." If the suit be concerning a service, on account of which the Tenant has put himself on the Assise, as he is at liberty to do if he chuse, then, the Writ will be as follows.

CHAP. IX.

"The King to the Sheriff, Health. Prohibit *N.* "that he holds not in his Court the Plea which is be- "tween *M.* and *R.* of the service of eight shillings, and "of one Quart[1] of Honey, and two stikes[2] of Eels "which the aforesaid *M.* exacts of the aforesaid *R.* for "the Yearly service of his free Tenement that he holds "of him, in such a Vill, for which Tenement the said "*R.* acknowledges that he owes him eight shillings a "year for every service, unless the Duel be waged be- "tween them, because *R.* from whom the service is "required, puts himself on my Assise, and prays a Rec- "ognition, whether he owes eight Shillings a year for "every service, and besides one Quart of Honey, and "two stikes of Eels. Witness &c."

[1] *Sextarii.* Vide Spelm. Gloss. ad vocem.

[2] *Stikis.* A stike seems to be 25, *sic dicta quod trajecto vimine, (quod* stic *dicimus)* connectebantur. (Spelm. Gloss. ad voc. *stica.)*

CHAP. X.

By means of such Writs, the Tenant may protect himself, and may put himself upon the Assise, until his Adversary, appearing in Court, pray another Writ, in order that four lawful Knights of the County, and of the Vicinage, might elect twelve lawful Knights from the same Vicinage, who should say, upon their oaths, which of the litigating parties, have the greater right to the Land in question. The Writ for the summoning of the four Knights is as follows——

CHAP. XI.

"The King to the Sheriff, Health.[1] Summon, by "good summoners, four lawful Knights of the Vicinage "of Stoke, that they be at the Pentecost before me, or "my Justices, at Westminster, to elect on their oaths, "twelve lawful Knights of that Vicinage, who better "know the truth, to return, on their oaths, whether "*M.* or *R.* have the greater right in one Hyde of Land "in Stoke, which *M.* claims against *R.* by my Writ, "and of which *R.* the Tenant, hath put himself upon "my Assise and prays a Recognition to be made, which "of them have the greater right in that Land; and, "cause their names to be imbreviated. And summon, "by good Summoners, *R.* who holds the Land, that

[1] Vide F. N. B. 9.

" he be then there to hear the election, and have there " the Summoners, &c."

CHAP. XII.

At such day the Tenant may essoin himself, and again have recourse to three reasonable Essoins.

And this, indeed, appears but right; since, as we have explained in a former part of this Treatise, as often as any one appears in Court, and there performs that which the Law requires of him, he may again recur to his Essoins.

But, then, it would happen, or, at least it might so, that as many, if not a greater number, of Essoins, may intervene in the remedy of the Grand Assise, as of the Duel, which is by no means compatible with what we have already laid down. Let us, then, suppose, that the Tenant has cast three successive Essoins against the election of the twelve, by the four Knights. After these three Essoins, and upon the Tenant appearing in Court, one or more of the four Knights may on the same day cast an Essoin; and, if this be conceded, the Tenant might again, after the Essoins of the four Knights were expired, essoin himself afresh, and thus the Assise could scarcely, if ever, be brought to a conclusion. We should, therefore, observe, that a certain just Constitution [1] has been passed, under which the

[1] A Constitution, an Institution, an Assise, were promiscuously employed to designate a Statute or Law.

Court is authorised to expedite the suit, upon the four Knights appearing in Court on the day appointed them, and being prepared to proceed to the election of the twelve Knights. Upon this occasion, whether the Tenant appear or absent himself, the four Knights shall proceed upon their oaths to elect the twelve. But, if the Tenant himself be present in Court, he may possibly have a just cause of Exception against one or more of the Twelve, and concerning this he should be heard in Court. It is usual, indeed, for the purpose of satisfying the absent party, not to confine the number to be elected to twelve, but to comprise as many more as may incontrovertibly satisfy such absent party, when he return to Court. For Jurors may be excepted against by the same means by which Witnesses in the Court Christian are justly rejected.[1] It should also be observed, that if the party, who has put himself upon the grand Assise, appear, although some of the four Knights are absent, the twelve may be elected by one of the four taking to himself two or three other Knights from the same County, if such happen to be in Court, though not summoned for the purpose, provided such course of proceeding meet with the approbation of the Court, and be mutually consented to by the litigating parties. But, for greater caution, and to avoid all possible cavil, it is usual to summon six or more Knights to Court, for the purpose of making the election.

[1] "All the persons suspect to either of the party," says the Regiam Majestatem, "shall be repelled." (Vide Reg. Majestatem, L. 1. c. 10.) See also Bracton 185. a.

Indeed, if the object be to expedite the proceedings, it will more avail to follow the direction of the Court, than to observe the accustomed course of the Law. It is, therefore, committed to the discretion, and Judgment of the King or his Justices, so to temper the proceeding, as to render it more beneficial and equitable.

CHAP. XIII.

But any person may put himself upon the Assise concerning a Service, or Land, and besides, concerning demands of service, and concerning the Right of Advowson to any Church. Nor is the party confined to this remedy, as against a stranger merely, but he may avail himself of it against his Lord for the purpose of ascertaining, whether the Lord has greater Right to retain the object in question in his Demesne, or the Tenant to hold it of him. It is easy to form a Writ, adapted to the variety of circumstances.

CHAP. XIV.

The Election of the twelve Knights having been made, they should be summoned to appear in Court, prepared upon their oaths to declare, which of them, namely, whether the Tenant, or the Demandant, possess the greater right to the property in question. Let the Summons be made by the following Writ—

CHAP. XV.

"THE King to the Sheriff, Health. Summon, by "good Summoners, those twelve Knights *R.* and *N.* "(naming each) that they be, on such a day, before "me or my Justices at such a place, prepared on their "oaths to return, whether *R.* or *N.* have greater "right, in one Hyde of Land, or in the subject matter "of dispute, which the aforesaid *R.* claims against "the aforesaid *N.* and of which the aforesaid *N.* the "Tenant, has put himself upon our Assise, and has "prayed a Recognition, which of them have the "greater right to the thing in question; and, in the "mean time, let them view the Land or Tenement it-"self, of which the service is demanded; and Sum-"mon, by good Summoners, *N.* the Tenant, that he "be then there to hear that Recognition, &c."

CHAP. XVI.

ON the day fixed for the attendance of the twelve Knights to take the Recognition, whether the Tenant appear, or absent himself, the Recognition shall proceed without delay; nor shall any Essoin avail the Tenant, because as his presence is not requisite, the Recognition may proceed without him;[1] since, if he

[1] "The absence of either of the Parties shall not stay the "Assise to proceed, seeing they did consent that the matter "should pass to the knowledge of an Assise." (Regiam Majestatem, L. 1. c. 12.)

were present, he would, by having, when in Court, put himself upon the Grand Assise, be precluded from alleging any reason, why it should be deferred. It is different with respect to the absence of the Demandant. If he should essoin himself, the Assise shall, for that day, be deferred, and another day shall be given in Court; because though a Party may lose by his default, no one when absent shall gain anything.

CHAP. XVII.

When the Assise proceeds to make the Recognition, the right will be well known either to all the Jurors, or some may know it, and some not, or all may be alike ignorant concerning it. If none of them are acquainted with the truth of the matter, and this be testified upon their oaths in Court, recourse must be had to others, until such can be found who do know the truth of it. Should it, however, happen that some of them know the truth of the matter, and some not, the latter are to be rejected, and others summoned to Court, until twelve, at least, can be found who are unanimous.[1] But, if some of the Jurors should decide for one party, and some of them for the other, then, others must be added, until twelve, at least, can be ob-

[1] Concerning this mode of supplying the Jurors, termed in our old Law Books *afforciament*, the Reader may consult the Mirror, c. 4. s. 24.—Bracton, L. 4. c. 19.—Britton, p. 136.—Fleta, 4. c. 9. s. 9. and Mr. Kelham's Translation of Britton's Pleas of the Crown. Note 22. p. 35.

tained who agree in favor of one side. Each of the Knights summoned for this purpose ought to swear, that he will neither utter that which is false, nor knowingly conceal the truth. With respect to the knowledge requisite on the part of those sworn, they should be acquainted with the merits of the cause, either from what they have personally seen and heard, or from the declarations of their Fathers, and from other sources equally entitled to credit, as if falling within their own immediate knowledge.[1]

CHAP. XVIII.

When the twelve Knights, who have appeared for the purpose of making Recognition, entertain no doubt about the truth of the thing, then, the Assise must proceed to ascertain, whether the Demandant, or Tenant, have the greater right to the subject in dispute.

But if they decide in favor of the Tenant, or make any other declaration, by which it should sufficiently appear to the King, or his Justices, that the Tenant has greater right to the subject in dispute, then, by the Judgment of the Court, he shall be dismissed, for ever released from the claim of the Demandant, who shall

[1] The Reader will remark the singular coincidence, in many respects, between the two proceedings, the Duel and the Grand Assise. This was no doubt intentional, and indicated a wise and political tenderness towards the prejudices of the age, still strongly inclining towards the trial by Battle.

never again be heard in Court with effect concerning the matter. For those questions which have been once lawfully determined by the King's Grand Assise, shall upon no subsequent occasion be with propriety revived. But, if by this Assise it be decided in Court in favor of the Demandant, then, his Adversary shall lose the Land in question, which shall be restored to the Demandant, together with all the fruits and produce found upon the Land at the time of Seisin.[1]

CHAP. XIX.[2]

A PUNISHMENT is ordained for those who rashly swear in this Assise, and is with much propriety inserted in that Royal Institution.[3] For if the Jurors

[1] "Because," says the Regiam Majestatem, "the fruits extant "and dependant upon the ground are part of the Land and "ground." (L. 1. c. 12.)

[2] It may be here noticed, that the present chapter is one of the authorities to which Lord Coke appeals, in support of his position, that an attaint lay at common Law, both in Pleas real and personal. (2 Inst. 129, 236.)

[3] In commenting upon the Statute *de finibus levatis.* 27. Ed. 1. Mr. Barrington observes, "the Statute consists of four chapters, "and the first states, the great perjury which prevailed among "Jurors at this time, which offence *in a witness* was not now "punishable by any Act of Parliament; it may be perhaps "thought a reflection on the common Law to assert, that this "crime was totally disregarded, but yet we do not hear of any "such prosecution, except the attaint of a Jury be considered as "such." (Observ. on Anc. Stat. 176.) It will not, I trust, be considered as a want of respect for the high authority in question, to observe, that the general position intended to be supported, seems to be refuted by the latter part of the passage, if, as I conceive, the *Juror* was, in those times, of necessity a

shall, by due course of Law, be convicted, or, by legal Confession, be proved to have perjured themselves in Court, they shall be despoiled of all their Chattels and Moveables, which shall be forfeited to the King, although by the great clemency of the Prince, their freehold Tenements are spared. They shall also be thrown into prison, and be there detained for one year at least. In fine, deprived for ever after of their Law, they shall justly incur the mark of perpetual infamy. This penalty is properly ordained, in order that a similarity[1] of punishment may deter Men in such a Case, from the unlawful use of an Oath.

It should be observed, that the Duel never shall be waged in a case where the Assise cannot be resorted to. The converse of the proposition equally holds.

witness: it was part of his qualification that he was a witness, the two characters being then blended. This is, I submit, evident from the 17th chapter of the present book. A separation of character seems to have been the gradual effect of posterior times. Nor is this all. The punishment of a Juror, when guilty of perjury, appears from the present chapter of Glanville to have been imposed by an Act of Parliament. If this Act, like most, if not all, of those mentioned in the following pages, be not now extant, it is assuredly no small part of the merit of Glanville, that he has preserved the substance of those public Records, of which no other trace can be found.

[1] Our author seems to allude to the punishment inflicted on the conquered Champion—such Champion's cowardice being esteemed a species of perjury, as Lord Coke informs us, with which the perjury of the Jurors in the assise was commensurate. The same principle pervades the Norman Code—*Omnes autem illi, qui perjurio vel lœsione fidei sunt infames, ab hoc etiam sunt repellendi; et omnes illi qui in bello succubuerunt.* (Le Grand Coustoum. de Normand. c. 62.)

If the Land in question be adjudged to the Demandant, he shall be remitted to the Sheriff of the County, where the Land is situated, in order to recover his possession.

And, for this purpose, he shall have the following Writ——

CHAP. XX.

"The King to the Sheriff, Health. I command you "that, without delay, you deliver possession to *N.* of "one Hyde of Land, in such a Vill, which he claims "against *R.* of which the said *R.* put himself upon my "Assise, because the said *R.*[1] has recovered that Land "in my Court by a Recognition. Witness, &c."

CHAP. XXI.

But, if there are not any Knights to be found in the Vicinage, nor in the County itself, who are acquainted with the truth of the matter in dispute, it is a question, what steps shall be resorted to?

Whether, from that circumstance alone, the Tenant shall prevail against his Adversary?

If this be answered in the affirmative, shall the Demandant lose his Right, supposing he has any? A doubt, indeed, may be entertained upon this subject.

[1] This *R.* should be *N.*

Let us suppose that two or three lawful men, or even more, provided the number did not exceed twelve, who, as Witnesses of the fact, should offer themselves in Court, to prove it. Let us, even, suppose that they were of such an age as to be qualified to make proof by the Duel, and should make use of all such words in Court, on account of which the Duel is generally awarded. After all this, it may be doubted, whether any of them shall be heard upon the subject.

Book III.

OF WARRANTORS; AND OF TWO LORDS, UNDER ONE OF WHOM, THE DEMANDANT AVOWS, AND UNDER THE OTHER, THE TENANT.

CHAP. I.

When the presence of the Tenant only happens to be requisite, and in itself precludes the necessity of any other person appearing to answer, the order of Pleading which is observed in Court is such as we have described.

But the presence of another party becomes no less necessary than that of the Tenant, if the latter declare in Court, that the subject in dispute is not his own, but that he merely holds it, as a Loan,[1] or a Hireing, or a Pledge, or as committed to his Custody, or in some other mode entrusted to him by another; or if he should allege, that the property were his own, but that he had a Warrantor[2] from whom he had received

[1] *Commodatam, locatam, &c.* The Reader will recognise these Terms as borrowed from the Roman Law.
In the tenth Book, our author resumes the discussion of them.

[2] *Warrantum.* Sir Henry Spelman is inclined to derive this Term from the Saxon Primitive War, *arma, telum, defensio, &c.*

it, either as a Gift, or Sale, or in Exchange, or, generally, found his Title to the thing upon any other cause of this nature.

If the Tenant should declare in Court, that the property is not his own, but belongs to another, then, such other person must be summoned by another Writ, but yet of a similar nature—and thus the plea shall be commenced anew against him. And when such other person at last appears in Court, he in the same manner will declare, either that the property belongs to him, or not. If the latter, then, the party who had first asserted in Court, that the property did belong to him, shall thereby lose the Land irretrievably, and he shall be summoned to appear in Court, and hear his Judgment; and thus, whether he appear or absent himself, his Adversary shall recover possession. When the Tenant call a person into Court to warrant the Land, then, a reasonable day shall be given him in Court to produce such person there; and thus he may anew recur to three Essoins, with respect to his own person, and to the same number, with regard to the person of

Dr. Sullivan tells us, it was derived from *War*, because, in real Actions, the Trial was of old by Combat. Dr. Cowell, however, prefers deriving *warrantia* from the French *garantie* or *garant*. The Doctor notices the *stipulatio* of the Civilians, but, as he observes, "this reacheth not so far as our warranty." The term, it seems, is of great antiquity, and is said not to have been unknown to the *Longobardi* in their original settlements. (Speim. Gloss. ad voc. and Cowell's Interpreter, ad voc. and Sullivan's Lectures, 119.) It does not fall within the scope of these notes, to bring the Law down to the present day.—The translator would otherwise have availed himself largely of Bracton's 5th book. Fleta, L. 5. c. 4. Britton, 197, &c. Co. Litt. 364. b. et seq. and Mr. Butler's admirable annctations.

his Warrantor. The person cited to warrant having at last appeared in Court, he will either enter into the warranty of the subject in dispute, or decline it. If he adopt the former course, he then becomes a Principal Party in the suit, so that the remainder of the cause shall be entirely carried on in his name; but if, previous to this step, he essoin himself, the Tenant cannot excuse himself by an Essoin, but, if absent, shall be adjudged in default. If, however, the person called to warrant, being present in Court, should fail in entering into the warranty, then, the plea must altogether be continued between him and the party who has called him—and thus, by means of pleading conducive to such an end, the matter may come to the decision of the Duel, and that, whether the Tenant can produce his Charter of Warranty, or not, if he be prepared with an unobjectionable Witness to make proof, and he is willing to undertake it. (It should be observed, that when it is once ascertained, that the person cited to warrant ought to take that obligation upon him, the Tenant shall not afterwards lose the property in dispute, because if such property should be recovered in Court, the Warrantor shall be bound to make the Tenant a competent equivalent[1] if he possess sufficient means so to do.)

[1] *Escambium*, a term used in Domesday. Sir Edward Coke, in speaking of a warranty, observes, that it is a covenant real, annexed to Lands, whereby a man and his heirs are bound to warrant the same " and to yield other Lands and Tenements (which " in old books is called *in Excambio*) to the value of those that " shall be evicted by a former title." (See Co. Litt. 365. a. and 51 b.) It should seem from Bracton, that if the warrantor had

CHAP. II.

But it sometimes happens, that the person called to Court to warrant is unwilling to appear there, either for that purpose, or to shew that he ought not to warrant to the Tenant the property in question. In that case, upon the petition of the Tenant, and by the order and indulgence of the Court, the reluctant party shall be compelled to do so, and he shall be summoned by the following Writ.

CHAP. III.

"The King to the Sheriff, Health. Summon, by "good Summoners, *N.* that he be before me, or my "Justices, there on a certain day to warrant to *R.* one "Hyde of Land, in such a Vill, which he claims as his "Gift, or the Gift of *M.* his Father, if he will war-

not sufficient property to make a full restitution, he was to do so as far as his property extended, and the Tenant was to wait, until better times, for the deficiency. If the Warrantor had no property, he was not, from that circumstance, to be entirely absolved from making restitution, whilst there was any probability of his inheriting property from that person, on account of whom he was called to warrant.

On the other hand, he was not bound to warrant the deed of his ancestor, at the expense of any purchase made by himself.—Nor was the recompense to be estimated, beyond the value of the property at the time it was originally warranted.—Nor was one of many warrantors, required to bear the burthen solely, the others being obliged to contribute, (Bracton, 394. b. 395 a. See also le Grand Coustoum. de Norm. c. 50.)

" rant it to him, or to shew wherefore he ought not to
" warrant it to him; and have the Summoners and
" this Writ. Witness Ranuph, &c."

CHAP. IV.

On the day appointed, the Warrantor can either essoin himself, or not. If not, then, that indulgence which is allowed to another would be denied him, not being culpable; which would be no less inconvenient than unjust.[1] If he may essoin himself, let us suppose that he has properly essoined himself three times successively, it should on the third day, according to the Law and practice of the Court, be ordered, that he appear on the fourth day, or send an Attorney. If, on that day, he neither appear nor send an Attorney, it seems a question what steps are to be pursued. Because were the Tenement to be taken into the King's hands, such a step would seem an injustice committed on the right of the Tenant, since he has not been adjudged in default.

But if this course be not pursued, then the right of the Demandant, supposing he possesses any, would be unjustly deferred. And, indeed, the course mentioned

[1] "At the day assigned to the warrantor for appearance, he
" may essoin himself, or not essoin himself.
" If he neither appears, nor sends an Essoin, the power and
" benefit of the Law shall be denied to him which is granted to
" others: for it is an unseemly thing and an iniquity (that he
" being summoned, appears not by himself nor by another."
(Reg. Maj. L. 1, c. 21.)

shall be adopted, as most consonant to the Law and Custom of the Realm. Because, if any one should lose his Land, or merely the possession of it, through the default of his Warrantor, the latter shall be compelled to make him an equivalent recompense, and may, therefore, by means of the foregoing Writ, be distrained to appear in Court, and warrant the Tenement itself, or shew some reason on account of which, he should be exempt from the obligation of warranty.

CHAP. V.

It sometimes happens, that the Tenant, although he has a Warrantor, does not call him into Court, but takes upon himself entirely to dispute the Demandant's claim.

If the Tenant should pursue this course, and should lose the Land in question by the Duel, he cannot afterwards recover any thing against the Warrantor.[1]

But, according to this, a question may be proposed, whether, as any one can defend himself by the Duel, without the assent and presence of his Warrantor, he can put himself upon the King's Grand Assise, without the assent and presence[2] of the Warrantor? And, indeed, he may defend himself by the Assise upon a parity of reason as by the Duel.

[1] Having laid down the same doctrine, the Regiam Majestatem adds, "it is so to be understood of all other things debateable, "whereof the Warrantor is not called in lawful time." (L. 1. c. 22.)

[2] *Knowledge*, according to the Harl. and Bodl. MS.

CHAP. VI.

But it sometimes happens, that the matter is deferred on account of the absence of the Lords, when, for example, the Demandant claims the Tenement in question, as belonging to the fee of one Lord, and the Tenant, as belonging to that of another. In such a case, both the Lords must be summoned to Court, in order that, in their presence, the Plea may be heard, and, in the accustomed manner, decided, least any injustice should seem to be done to them when absent.

But upon the day on which they are summoned to appear in Court, both or either of them may lawfully cast an Essoin, and this three times in the usual manner. Should the Lord of the Tenant have recurred to three Essoins, it should be ordered, that he appear personally in Court, or send his Attorney.

If after this, he neither appear, nor send his Attorney, let the Tenant be directed to Answer and take the defence upon himself; and, if he should prevail, he shall retain the Land to himself, and from thenceforth shall do service to the King, because his Lord shall lose his service through his default, until he appear and perform there that which he ought to do.

In the same manner, may the Lord of the Demandant essoin himself; but, when he at last appear in Court, it may be asked, whether the Lord of the Tenant can again essoin himself? He may, indeed, until

he has once appeared in Court; because it is, then, incumbent upon him to allege some reason, why he ought not to wait any longer; and this Rule equally prevails with respect to the person of either Lord. But if, after having availed himself of three Essoins, the Lord of the Demandant should be absent, it may be a question, what the Law is? If, indeed, he should have first essoined himself, the Essoiners themselves shall be taken into custody, and the body of the Demandant himself shall be attached,[1] on account of his contempt of Court; and thus he shall be distrained to appear in Court, that it may be heard what he has to allege.

CHAP. VII.

When both the Lords appear in Court, the Lord of the Tenant will warrant the Land in question, as in

[1] *Attachiabitur. Attachiare* is said to be derived from the French *attacher*. It differed from *arrestere* in many respects. An Arrest, say the old Books, proceeds out of the inferior courts by precept; an attachment, out of the superior courts by precept, or writ. (Lamb. Eiren. L. 1. c. 16.) An Arrest lies only against the body of a Man; an Attachment, sometimes against the goods only. Thus Kitch. (fol. 279. b.) says, a man may attach a cow; and, in another case, that a man may be attached by a hundred sheep; and it is sometimes awarded against the body and goods together. An Attachment is said to differ from a *capias*, because the former is more general and extends to the taking of the goods, a capias extending to the body only. An Attachment is laid down as differing from a *Distress*, inasmuch as it is a Process enumerated to issue, previous to a distress. Thus far our old law Books, (vide Termes de la ley ad voc. attach. Cowell's Interpreter and Spelman's Glossary.)

his Fee, or he will deny that it is so. If he adopt the former course, it remains for him, either to take the defence upon himself, or entrust it to the Tenant, as he may feel disposed; and whichever course he pursues, the right of each of them will be saved, as well that of the Lord as of the Tenant, if their party should prevail in the contest. But, if the contrary should be the result, the Lord shall lose his services, and the Tenant his Land irretrievably. If the Lord of the Tenant, being present in Court, fail in the Warranty, the matter may be interpleaded between them, provided that the Tenant declare, that his Lord had unjustly failed in the Warranty, and, therefore unjustly, because he or his Ancestors had performed such and such specific services to the Lord or his Ancestors, as Lords of that fee, adding that of this fact he has those who have heard and seen it, and, in particular, a proper witness to prove it, or some other adequate and sufficient testimony ready to be adduced, as the Court shall direct.

CHAP. VIII.

A SIMILAR distinction must be made, in respect of the person of the Lord of the Demandant. When he appears in Court, he will either claim the Land in question, as in his fee, or not. And thus if he warrant the Title of the Demandant, and claim the Land as within his Fee, it is at his option, either to hold himself to the proof made by the Demandant, if he be so

inclined, or to take upon himself to prove his Right against the other, saving the Right of both of them, namely, as well his own as that of the Demandant, if their party prevail in the suit. If, however, it happen to be unsuccessful, both the Demandant and his Lord shall lose their right. On the other hand, if the Lord decline to warrant the claim of the Demandant, then, the latter shall be amerced to the King on account of his false claim.

Book IV.

OF ECCLESIASTICAL ADVOWSONS.

CHAP. I.

Pleas concerning Ecclesiastical Advowsons[1] are accustomed to be agitated, as well when the church is vacant, as when it is not vacant. If, upon a vacancy of a church, he who is seised of the Advowson should present a Parson[2] to it, and any one should question the Presentation and claim it, then, it must be distinguished, whether the dispute be concerning the Advowson itself, in other words, the right itself of presenting a Parson, or whether it merely relates to the

[1] *Advocationibus.* "*Advocatio*," says Sir Wm. Blackstone, "signifies in *Clientelam recipere*, the taking into protection, "and therefore is synonymous with Patronage, *Patronatus.*" (2 Comm. 21.) With this concurs Lord Coke—"*Advocatio* "signifying an advowing, or taking into protection, is as much "as *jus patronatûs.*" Again "In Britton Cap. 92. The Patron "is called *avow*, and the Patrons *advocati*, for that they be "either founders or maintainers, or Benefactors of the church, "either by building, donation, or increasing of it, in which re- "spect they were also called *patroni*, and the advowson *jus* "*patronatûs.*" His Lordship cites Bracton, L. 4. fol. 240. Fleta, L. 5. c. 14. (see Co. Litt. 17. b. and 119. b. Cowell ad voc. and Spelm. Gloss. ad voc.)

[2] *Personam*, a Parson. (Vide Co. Litt. 300. a. b. Bl. Comm. 1. 383.) Cowell derives the word from the French *personne.*

last Presentation, that is, the Seisin of the right of presenting a Parson. If the dispute merely concern the last Presentation, and the Claimant allege, that he or one of his Ancestors had the last Donation and Presentation, then, the Plea shall be discussed by the Assise appointed concerning Ecclesiastical Advowsons; and an Assise shall be summoned to make Recognition, what Patron in time of peace presented the Parson who last died to that Church; and concerning this Assise we shall speak more fully hereafter,[1] when we come to treat of other Recognitions. The party who by this Assise proves in Court the last Presentation, shall thereby recover Seisin of the Presentation of the vacant Church, concerning which the dispute is; so that he shall lawfully present a Parson to the Church, saving the right and claim of the Demandant with respect to the Right of Advowson.

But, if the right of Advowson be the sole subject of dispute, then the Demandant should subjoin to his claim, that he, or one of his Ancestors, had the last Presentation of that Church; or, he should concede, that his Adversary, or one of his Ancestors, had the last Presentation; or, he should allege, that some third person had the last Presentation; or, in fine, that he knows not who had it.

Whichever of these courses he pursues, if his Adversary claim the last Presentation, as made in his own person, or in that of one of his Ancestors, the Recog-

[1] L. 13. C. 18. et seq.

nition shall in every instance proceed upon the Right of Presentation, unless in one only of the foregoing cases, namely, when the Demandant concedes to his Adversary, that he or one of his Ancestors, enjoyed the last Presentation, for then, without having recourse to a Recognition, he shall present one Person at least. The last Presentation being decided by the Assise or by some other legal mode, and a Parson being instituted into the Church upon the Presentation of the successful party, then shall the person, who is inclined to contend for the Right of Advowson, have the following Writ.

CHAP. II.

"The King to the Sheriff, Health. Command *N.* "that, justly and without delay, he relinquishes to *R.* "the Advowson of the Church, in such a Vill, which "he claims to belong to him, and of which he complains "that he unjustly deforced him; and, unless he do so, "summon him by good Summoners, that he be on such "a day before us, or our Justices, to shew why he "has failed; and have there the Summoners and this "Writ &c."

CHAP. III.

The Party[1] being summoned may avail himself of the same number of Essoins, and that by the same

[1] That is, according to the Cottonian and Dr. Milles's MS. the person who has deforced the advowson of the church.

means, as we have already detailed, in treating concerning Pleas affecting Land. Supposing, then, that after having cast three Essoins, he should neither appear nor send an Attorney on the fourth day, it may be asked what the Law is?

In such a case, the seisin of the Presentation of the Church shall be taken into the King's hands, and that by the following Writ.

CHAP. IV.

"The King to the Sheriff, Health. I command you "that, without delay, you take into my hands the "Presentation of the Church, in such a Vill, which *N.* "claims against *R.* and concerning which, there is a "Plea in my Court between them, and make known "the day of the Caption to my Justices, &c."

CHAP. V.

The Sheriff is bound to execute this Writ, in the following manner: he should go to the Church in question, and there in a public manner, and in the presence of respectable men, declare, that he had seised the Presentation[1] of such Church into the King's hands, in which the Seisin shall continue for fifteen days. The Tenant, if he feel so disposed, may[2] re-

[1] *The Advowson*, Bodl. and Cotton. MS.

[2] *During the* 15 *days*, Cotton. and Dr. Milles's MS.

plevy,[1] and thus recover it, in the same manner as stated in the first Book.

CHAP. VI.

All the Essoins to which the Defendant can have recourse being terminated, at the day appointed for the parties in Court, either both, or neither, or one only, of the parties will appear. If one only, or both of them, be absent, the matter must be ordered in a manner similar to that we have formerly explained, in treating of Pleas concerning Land. But if both parties appear in Court, the Demandant should then propound his right as against his Adversary, in the following words: "I demand the Advowson of this Church, as "my right, and appertaining to my Inheritance, and "of which Advowson I was seised, or one of my An- "cestors was seised, in the time of King Henry the "Ist, the Grand-father of our Lord King Henry, or "after the Coronation of our Lord the King; and being "so seised, I presented a Parson to the same Church "when vacant, at one of the before-mentioned periods; "and I so presented him, that upon my presentation "he was instituted Parson into that Church; and if "any one would deny this, I have some credible Men "who both saw and heard the fact, and are ready to "prove it as the Court shall award, and particularly "such, and such persons." The claim of the Demand-

[1] "*Replegiare* is compounded of *re* and *plegiare*, as much as to "say, to redeliver upon pledges or Sureties." (Co. Litt. 145. b.)

ant being heard, the Tenant may defend himself by the Duel; and the proceedings will accordingly, from that period, be conducted in the manner we have formerly explained. Should, however, the Tenant chuse to put himself upon the Grand Assise, he is perfectly at liberty so to do; and the Assise must then proceed in the form we have previously detailed.

CHAP. VII.

But, although a Church be not vacant, a dispute may arise concerning the Advowson of it, if the Parson of the Church, or he who is invested with that Character, derive his Title from one Patron, at the same time as another Person, conceiving himself to be the more rightful Patron of such Church, lay claim to the Advowson. In such case, the following Writ shall be issued upon his application.

CHAP. VIII.

"The King to the Sheriff, Health. Summon, by "good Summoners, the Clerk *N.*, Parson of such a "Church, that he be before me, or my Justices, at "Westminster, on such a day, to shew of what Patron "he holds himself in that Church, the Advowson of "which the Knight *M.* claims to belong to him. Sum-"mon also, by good Summoners, *N.* who deforced him

"of the Advowson, that he be there to shew why he "deforced him of that Advowson, and have there the "Summoners and this Writ. Witness, &c."

CHAP. IX.

If, after the Clerk has been summoned, he neither appear on the appointed day, nor send any one to excuse his absence, neither on the first, second, nor third summons, it may be doubted, by what mode he should be distrained to appear in Court, especially if he possess no lay Fee, to which recourse can be had for such purpose.[1] A similar doubt may be proposed upon the course to be pursued, should he, after having thrice essoined himself in Court, neither appear on the fourth day, nor send an Attorney to answer for him.

Should either of these cases occur, let the Bishop of the place, or his Official, if there happen to be no Bishop, be enjoined to distrain the Clerk to appear in Court, or to punish his default, by taking the Church into his hands, or to distrain the Clerk by some other lawful means.

When, at last, the Clerk appear in Court, he will

[1] Mr. Madox informs us, when speaking of the King's Debtor, "If he was a Clergyman, and had no lay Fee, whereby he might "be distrained, writs were wont to issue to the Bishop of the "Diocese, commanding him to distrain such Debtor, by his "Ecclesiastical Benefices. Many of these writs had in them a "clause importing, that if the Bishop failed to make due Exe-"cution, the King would cause the Debt to be levied on the "Bishop's Barony." (Madox's Excheq. c. 23.)

either acknowledge the Demandant as Patron, and admit that he was instituted upon his Presentation, or upon that of one of his Ancestors, or he will allege some other person to be the Patron.

In the former case, the Plea shall cease in the King's Court. If the Patron deny the assertion of the Clerk, alleging himself to have been instituted upon his Presentation, or that of one of his Ancestors, and be disposed to contest this point against the Clerk, the Plea shall be discussed before his Ecclesiastical Judge. But, if the Clerk name another Patron, such Patron should be summoned to appear in Court, which Summons he will either obey, or not. In the latter case, if he neither appear at the first, second, nor third Summons; or if, having essoined himself in Court the first, second, and third times, he should neither appear nor send an Attorney on the fourth day, it may be asked, by what means he shall be distrained, and how his default shall be punished? The Advowson of the Church in question shall indeed be taken into the King's hands, and thus remain for fifteen days; and if, within that period, the Clerk should not appear, then, the Demandant shall have the Seisin delivered to him. But what shall be done to the Clerk himself? Whether shall he from that circumstance, lose his Church?[1]

But, if the Party summoned appear in Court, he

[1] He should not lose his church, according to the Regiam Majestatem, (L. 8. c. 33.)

will either acknowledge himself Patron of the Church in question, or disclaim all right to the Advowson.

Should he pursue the latter course, the Suit shall cease in the King's Court, and the cause must be discussed between the Patron and the Clerk, in the Ecclesiastical Court. But if, whilst the Suit be pending, the Church itself happen to become vacant, it may be asked, to whom the intervening Presentation belongs? If, indeed, there be no doubt moved concerning the last Presentation, but the person against whom the Right of Advowson be sought, or one of his Ancestors had the last Presentation, then, he shall present the Parson in the mean time, and until he lose his Seisin. It is a consequence of the same principle, that if the Advowson of any Church should be seised into the King's hands on account of the default of the Patron, and, during the fifteen days, it should happen to become vacant, the Patron shall not within that period lose his Presentation. But, if the party summoned, should claim the Right of Advowson, and elect to defend it as his own, then, indeed, the Suit must proceed in the order we have already explained. If he should prevail, he and his Clerk shall be freed from the Claim of their Adversary; but, if he fail in the Suit, then, he and his Heirs shall for ever lose the Advowson.

CHAP. X.

But what course shall be pursued with the Clerk, the Parson of the Church, who has declared in Court,

that he held the living upon his[1] Presentation? In the King's Court, indeed, nothing farther is to be done in the matter, unless as it concerns the Advowson between the two Patrons.

But the Patron, who has recently recovered the Right of Advowson, shall proceed against the Clerk in the Ecclesiastical Court before the Bishop or his Official, under these restrictions—if, at the time of Presentation, the Person presenting such Clerk was considered to be the Patron, then, the Church shall continue to be held by the Clerk, during the remainder of his life. For, upon this subject, a Statute has been passed in the Reign of the present King, concerning those Clerks who have obtained Livings upon the Presentation of such Patrons as have, in time of war, violently intruded themselves into Ecclesiastical Advowsons; and by such Statute it is provided, that Clerks thus presented shall not lose their Churches during their lives. Thus is the question above proposed, resolved. But, after the decease of Clerks so presented, the Presentations of the Churches shall return to the rightful Patrons.

CHAP. XI.

As connected with the preceding subject, a question arises. Let us suppose that a Patron has, in the King's Court, recovered the Advowson as against

[1] The unsuccessful party.

another; and that afterwards, in process of time, the Clerk of the Church should die. In such a case, can the party against whom the Advowson had been recovered again demand an Assise, concerning the last Presentation; and, if he should obtain a Writ to summon the Assise, what step must his Adversary resort to? Let us suppose, that he himself had never presented an Incumbent to the church in question, but that his Father, or at least one of his Ancestors, had so done, and it be objected to him by his Adversary, that he ought not to have a Recognition, because he had already lost the Advowson by the former Judgment of the Court, whether, it may be asked, shall the Assise cease on that account, or not? It appears that it ought[1] to cease, because, not having the last Presentation, he never had the Seisin of the Advowson; but, it seems, that he might well found his claim upon the Seisin of his Father, notwithstanding any thing that may have been done, concerning the Right itself of Presentation. But if the point of the last Presentation can be again agitated, then, it should seem, that the Judgments of the King's Court are not of perpetual obligation. For if the Advowson of a Church were once adjudged to any person, it does not appear consistent with Justice that the Adverse party should by any means, which can be subsequently resorted to, recover any Seisin in that Court, especially against him in whose favor the Advowson has been already

[1] The Harl. Bodl. and Cotton. MS. concur in introducing *not* into this passage.

decided, unless any new circumstance should intervene, on account of which he ought again to be heard. If therefore, an Assise should be summoned for that purpose, it should cease from this circumstance, that although it were conceded that the Claimant, or one of his Ancestors, had the last Presentation, yet it might be alleged, that, if he or his Ancestors had any Right, they lost it by the Judgment of the King's Court; and, this being proved by the Record of the Court, the Complainant shall lose his cause, and shall in addition be amerced to the King.

CHAP. XII.

It should be observed, that it sometimes happens, that one Clerk sues another in the Ecclesiastical Court, concerning a Church. Should they derive their Titles through different Patrons, the Ecclesiastical Court may, upon the petition of either of the Patrons, be prohibited from proceeding in the Suit, until it be ascertained, in the King's Court, to which Patron the Advowson of the Church belongs. For this purpose the following Writ shall Issue.

CHAP. XIII.

"The King to such Ecclesiastical Judges, Health.
"*R.* hath made known to us, that when *I.* his Clerk
"held the Church, in such a Vill, on his Presentation,

"the Advowson being his, as he says, *N.* a Clerk, de-
"manding the same, as of the Advowson of *M.* a
"Knight, draws the said *I.* into a suit before you in
"the Court Christian. But if the aforesaid *N.* should
"recover the Church under the Advowson of the afore-
"said *M.* it is clear that the said *R.* would incur the
"loss of his Advowson. And since suits concerning
"the Advowsons of Churches belong to my Crown and
"Dignity, I prohibit you from proceeding in that
"cause, until it be proved in my Court, to which of
"them the Advowson of such Church belongs. Wit-
"ness, &c."

But if, after this Prohibition, they proceed in the cause, then, they shall be summoned to appear in the King's Court, and answer for their conduct, by the following Writ.

CHAP. XIV.

"The King to the Sheriff, Health.[1] Prohibit such
"Judges, least they hold plea in the Court Christian,
"concerning the Advowson of such a Church, of which
"*R* the Patron of that Church complains, that *N.* draws
"him into a Suit in the Court Christian; because Pleas
"concerning the Advowson of Churches appertain to
"my Crown, and Dignity. And summon, by good
"Summoners, such Judges, that they appear before me,
"or my Justices, on such a day, to shew wherefore,

[1] Vide F. N. B. 89.

"they held that Plea, contrary to my Dignity, in the "Court Christian. Summon also, by good Summoners, " the aforesaid *N.*, that he be then there to shew where- "fore, he drew the aforesaid *R.* into a Suit, in the "Court Christian. And have, &c. Witness, &c."

Book V.

OF THE QUESTION OF CONDITION, AND OF VILLEINS-BORN.

CHAP. I.

Our subject leads us in the next place to treat of Pleas concerning the Conditions of persons. Questions upon this subject arise, when any one would draw another, from a state of freedom, into that of Villenage;[1] or when any one, being in the latter state, seeks to emancipate himself. When any one claims another who is in Villenage as his Villein-born,[2] he shall have the Writ *de nativis*, directed to the Sheriff; and

[1] *Villenagium.* "*Villein* is from the French word *Villaine*, "and that, *à villâ, quia villæ adscriptus est.*"—"*Villenagium* (as "in like cases hath been said where the termination is in *age*) is "the service of a Bondman. And yet, a free-man may do the "service of him that is bond." (Co. Litt. 116. a. See also Cowell ad voc. and Mirror, c. 2. s. 28.)

[2] *Nativum.* In the 6th chapter of the present Book our Author explains the sense in which he uses the term—*nativi à primâ nativitate suâ.* "In Glanville," says Lord Littleton, "the *nativi* "are comprehended under the Term *Villenagium*, which is used "by that Author synonymously with Servitude, and in opposition "to freedom, as a state, not a tenure." (3 Hist. Hen. 2. 189.) Upon the Term *nativus*, Sir Edward Coke observes, "in the common Law he is called *nativus, quia pro majore parte natus est servus.*" (Co. Litt sed vide Craig. L. 1. Dieg. 4. § 6.)

by that Writ he shall, before the Sheriff of the County, claim the Villein against him, who holds him in Villenage. And, if his Villenage be not denied before the Sheriff in the County Court, then the Plea concerning such Villein-born shall proceed before the Sheriff, as we shall presently explain, between the person claiming, and the person in possession, of the Villein. But, if the Villein allege himself to be a free-man, and give security to the Sheriff to prove the fact, then, the suit shall cease, as far as applies to the County Court; because the Sheriff ought not any farther to interfere in it.[1] But, if the Sheriff persist in hearing the suit, then, he whose condition is questioned shall complain to the Justices, and shall obtain the King's Writ, in order that, if he should give security to the Sheriff to prove his freedom, the suit may be removed before the Justices of the King's Court, and in the mean time, the party be unmolested. The Writ is as follows.—

CHAP. II.

"The King to the Sheriff, Health.[2] *R.* complains "to me that *N.* draws him to Villenage, although he "is a free-man, as he says. And, therefore, I com- "mand you that, if the said *R.* make you secure of "prosecuting his claim, then, that you put the suit "before me, or my Justices, on such a day; and, in the "mean time, you cause that he be in peace; and sum-

[1] In this the Mirror, (c. 2. s. 28.) concurs.

[2] Vide F. N. B. 171. 172.

"mon, by good Summoners, the aforesaid *N.* that he "be then there to shew why, he unjustly draws him to "Villenage. And have there, &c."

CHAP. III.

By the same Writ, the party who lays claim to the other, as being his Villein, shall be summoned; and a day shall be appointed him on which he may prosecute his claim. But, if on the day appointed, the person who is claimed as a Villein should neither appear, nor send a Messenger, nor Essoin, let the same course be pursued, as that before described in treating of Pleas, where the Pledges are to be attached. But, if he chuse to essoin himself, he may avail himself of the same number of Essoins, and on the same occasions as we have already mentioned. But if the party who claims the other as his Villein, neither appear on that day, nor send, let the other party, if present, be dismissed unconditionally, under such form, namely, that the claimant shall recover so much as by Law he ought to recover, concerning which principle we have spoken more fully, in the preceding part of this Treatise. In the mean time, the party who is claimed as a Villein shall be in Seisin of his freedom.

CHAP. IV.

Both parties being present in Court, the freedom shall be there proved in this manner: the party who

claims his liberty, shall produce a number of his nearest relations and kindred, springing from the same stock from which he descended. If their freedom be recognized and proved in Court, the party who demands [1] his freedom shall be liberated from the yoke of servitude. But, if the free condition of those produced be denied,[2] or a doubt be entertained respecting it, recourse shall be had to the Vicinage, whose Verdict shall ascertain the fact, whether those produced are free, or not: and, according to its decision, the matter shall be adjudged. But, if the party who claims the other as his Villein, should bring forward other persons to prove the contrary, namely, that such persons as the claimant has now brought forward are his Villeins-born, and that they sprung from the same common stock with him, whom he claims as a Villein-born, then, in like manner, should those produced by both sides be recognized as of common kindred, let it be inquired by

[1] *Proclamat*, according to the Bodl. MS, which I follow, *proclamo, appello, provoco*, &c. (Spelm. Gloss. ad voc.)

[2] "Yet," says the Mirror, "if the Defendant can shew a free "stock of his Ancestors, either in the conception, or in the birth, "the Defendant hath always been accounted for a freeman, "although his Father, Mother, Brother, and Cousins, and all his "Parentage, acknowledge themselves to be the Plaintiff's Vil-"leins, and do testify the Defendant to be a Villein." (Mirror, c. 3. s. 23.)

We must suppose that this was an improvement *posterior* to the time of *Glanville*, since though some part of the Mirror was probably written before the conquest, the other part was written subsequently to the Reign of Henry the 2nd. Few ancient law books would perhaps stand higher than the Mirror, could we clearly ascertain what was original, what was superadded. At present, one part of the work is often a direct refutation of another part.

the Vicinage,[1] which of them are the nearest to him; and, according as the inquiry turns out, let the Judgment be given. In a similar manner, if those produced by one party should[2] deny in any respect his relationship, or, if a question arise concerning it, every doubt of this nature shall be determined by the Vicinage. The freedom having been sufficiently proved in Court, then, the party whose liberty has been questioned shall be absolved from the claim of him who would draw him to Villenage, and for ever freed from it. If, however, he should fail in his proof, or, if he should be recovered by his Adversary as his Villein-born, he shall be irrecoverably adjudged to belong to his Lord, together with all the Chattels he possesses. The same form and order are observed in pleading, when a freeman is claimed as a Villein, or when any one, in a state of Villenage, aspires of his own accord to freedom. For this purpose, the party whose freedom is impeached shall come to the King's Court, and pray, that the suit might be removed into the same, which being conceded, the suit will then proceed in the form before stated. It must be remarked concerning this Plea, that the Duel cannot be resorted to, in order to prove the freedom of any one from his Birth.[3]

[1] "It shall be tried by an Assise," says the Reg. Majestatem, (L. 2. c. 11.)

[2] "*Acknowledge him to be related to them, whilst those pro-*" *duced by the other party should* "—Added by Cotton. Bodl. and Dr. Milles's MS.

[3] "*Or to disprove it.*" Bodl. and Dr. Milles's MS. The Regina Majestatem is yet more unrestrained—"But, it is to be noted, "that single combat shall not have place in any plea, to prove or "disprove the liberty or Estate of any man." (L. 2. c. 11.)

CHAP. V.

THERE are many modes by which a Man, in a state of Villenage, may acquire his freedom.[1] Thus if his Lord, being desirous of emancipating him, releases him, as well from all his own claims, as those of the Lord's Heirs: or, if the Lord give or sell him to another, for the purpose of liberating him. It must,

[1] The Mirror enumerates many other modes by which a Villein was enfranchised, besides those stated by Glanville, which appear rather to be put for examples, than as comprising all the instances of emancipation; and the Mirror confirms most, if not all, of the Examples in the text. (c. 2. s. 28.) The Regiam Majestatem informs us, that Holy Orders enfranchised, if taken with the consent of the Lord. The Villein was also enfranchised, if the Lord seduced his wife, for the Law permitted the Villein to receive no other amends. The Villein was likewise emancipated, if the Lord drew blood of him, or, if the Lord refused to bail him, either in a civil or criminal action in which he was afterwards cleared by Trial. (Regiam Majestatem, L. 2. c. 12.) The act of enfranchisement, when not arising by implication of Law, of which description many of the instances appear to be, was, in ancient times and before writing was common, accompanied by much publicity and ceremony. *Qui servum suum liberum facit in Ecclesiâ, vel Mercato, vel Comitatu, vel Hundredo, coram testibus et palam faciat, et liberas ei vias et portas conscribit apertas, et lanceam et gladium vel quæ liberorum arma in manibus ei ponat.* (Anglo-Sax. LL. Ed. Wilkins.) When writing became common, the method was, by the Lord's Deed expressly enfranchising the Villein. Upon the subject of Villenage, Fortescue's words are no less remarkable for the truth and beauty of the sentiment they express, than singular, when it is considered that they were addressed to a Prince. *Ab homine et pro vitio introducta est servitus: sed Libertas à Deo hominis est insita naturæ. Quare ipsi ab homine sublata semper redire gliscit, ut facit omne quod libertate naturali privatur.* (de laudibus legum Angliæ, c. 42.)

however, be observed, that no one in a state of Villenage can purchase his freedom with his own Money; for, in such case, he may, according to the Law and Custom of the Realm, be again recalled by his Lord to a state of Villenage, all the Chattels of a Villein-born being understood as so absolutely in the power of his Lord, as to preclude the former, at least with his own Money, and as against his Lord, from redeeming himself from Villenage. But, if a stranger with his own Money purchase the Villein's freedom, the Villein may for ever after maintain his freedom against his Lord, who has sold him. When any one has released a Villein, from all right which he, or his Heirs, could claim in him, or has sold him to a stranger, the Villein who has been thus enfranchised may for ever after defend his freedom, as well against the Lord himself, as his Heirs; whilst he can prove the fact in Court, either by a Charter, or by any other lawful means. And the question may even be decided by the Duel, if any one deny, that the party has been liberated from his state of Villenage, and, there be a proper Witness, who, having both seen and heard the very fact of Enfranchisement, is ready to prove his freedom in Court.

It should here be remarked, that a man may enfranchise his Villein-born, so far as the consequences affect the persons of himself, or his Heirs, but not as they apply to others. Because, if a man born a Villein, but thus rendered free, should be produced in Court, to make proof against a stranger, or to wage his Law, he

may be justly precluded, if it be objected against him, and proved in Court, that he was born in a state of Villenage, although his condition was such that he had been Knighted subsequently to his being enfranchised.[1] If a Villein-born peaceably remain during a year and a day[2] in any privileged Town[3] so that he be received in their community or Guild[4] as a Citizen, he shall from such circumstance be freed from Villenage.

[1] "Except he received his liberty and was made free with the "Licence, good-will, and special command of the King." (Reg. Maj. L. 2. c. 12.) Lord Littleton ascribes the rule in the text, to a jealousy of judicial proceedings. (3 Hist. Hen. 2. p. 192.) It more probably originated from the chivalric pride of the times. As the great Lords often personally engaged in the combat, their own importance was increased by keeping up the dignity of this mode of Trial..

[2] *Bracton, L.* 1. *fol.* 6. b. 7. *a.* But even this period would not operate as a bar to the Lord, if within the year *clameum suum qualitercunque apposuerit.*—"If he remained quietly" are the words of the Regiam Majestatem, during a year and a day in a privileged Town he became free—but out of a privileged town seven years was the period—but this latter prescription held not good against the King. (L. 2. c. 12.)

[3] *Villa privilegiata. Item*, says a Law of the Conqueror, *si servi permanserint sine calumniâ per annum et diem in civitatibus nostris vel in burgis in muro vallatis, vel in castris nostris, à die illâ liberi efficiuntur, et liberi à jugo servitutis suæ sint in perpetuum.* (LL. Gul. Conq. 66. Ed. Wilkins, p. 229.) "By *privileged Town* is meant a Town that had "Franchises by pre-"scription or charter—and this communication of liberty from "thence to a Villein residing among them so short a time, shews "the high regard to the Law of such corporations, and likewise "a desire to favor enfranchisement, as much as the settled rules "of property would admit." (3 Hist. Hen. 2. p. 191. Litt.) This part of our Author's text is considerably elucidated by Fleta, L. 4. c. 11. s. 11. and Co. Litt. 137. b.

[4] *Gyldam*, from the Saxon *geldan* and *gildan*. *Gildare* occurs in Domesday frequently *pro solvere, reddere.* (Vide Spelman Gloss.)

CHAP. VI.

VILLEINS-BORN are such from their Birth. Thus, if both the parents are Villeins-born, the Offspring is a Villein-born.[1] The same may be said where the Father is free but the Mother a Villein-born. If, however, the Mother be free, and the Father a Villein-born, the same rule prevails, as far as the purity of Condition be in question.

If a free-man take to wife a woman born in Villenage, whilst he so continues bound to the state of Villenage, he shall as a consequence lose his Law, as if he himself were a Villein-born.[2] If there be any children result-

[1] "Those are Villeins who are begot of Villeins and Niefs in "servitude, whether born in matrimony or out of matrimony: "those also are Villeins who are begotten of Villeins and born "of free-women in matrimony, and those are Villeins who are "begotten of a freeman and a Nief and born out of matri-"mony." (Mirror. c. 2. s. 28. See also Bracton, fols. 4. 5.) and Fleta, L. 1. c. 3.

[2] From the extreme brevity and quaintness of the original, it is a matter of some doubt, what the true meaning of the passage is. Lord Littleton gives the passage thus. "We are told by "Glanville, that in his time, if a freeman married a woman born "in Villenage *and who actually lived in that state*, he lost there-"by the benefit of the Law (that is all the legal rights of a free-"man,) and was considered as a Villein by birth, during the life-"time of his wife, on account of her Villenage." This, however, is at best but a loose paraphrase of Glanville. His Lordship was aware of it, and to confirm his representation of what is said, as he terms it, so *indistinctly* by Glanville, he refers to Bracton, fol. 5. Mr. Reeves makes this severe penalty upon the Husband to arise, not from the wife *living* in a state of Villenage, but her *holding property in Villenage*. The fact is, the text expresses neither Lord Littleton's Explanation, nor that given by Mr.

ing from the connection of a Woman born in Villenage belonging to one person, and a Man born in that state belonging to another, the children shall be proportionably divided between the two Lords.[1]

Reeves. I do not flatter myself to have succeeded better. In Britton's time, the wife was enfranchised during the coverture. (78. b.) Vide Co. Litt. 123. a. and 137. b. and Mr. Hargrave's notes thereon.

[1] "This," exclaims Lord Littleton, "was absolutely putting "children upon the same foot as cattle, or other stock on a farm, "without the regard that is due to the inherent freedom and "dignity of human nature." (3 Hist. Hen. 2. p. 191.)

Book VI.

OF DOWER.[1]

CHAP. I.

The term Dower is used in two senses. Dower,[2] in the sense in which it is commonly used, means

[1] On the subject of the present Book in general, see Bracton, fo. 92 et seq. and Fleta L. 5. c. 23. et seq.

[2] *Dos*, dower. "*Dos* is derived," says Sir Edward Coke, "*ex donatione, et est quasi donarium.*" (Co. Litt. 30. b.) Cowell and Spelman, however, both deduce it from the French *douaire.* (Cowell and Spelman's Gloss. ad voc.) The real objects of Dower are sustenance for the wife, and nurture and education for the children. (Fleta L. 5. Cap. 23.) The *Romans* were not in the habit of endowing their wives. When, therefore, *Tacitus* met with this peculiarity among the *Germans*, he was struck with it. *Dotem non Uxor marito sed uxori maritus affert.* (Tacit. de mor. German. 18.) Though Dower was unknown to the Romans, it seems to have been in use amongst the ancient *Hebrews*, (Gen. 34. 12. Exodus 22. 16. et al.) Nor was it unknown to the *Grecians*, if we may judge from that part of the Odyssey where Vulcan reclaims the Dower he had given to his frail wife. It seems to have been known to the ancient *Gauls*, (Cæsar de bello Gallico L. 6. c. 18.) And to the *Cantabri*, (Strabo L. 3.) *Craig*, however, doubts whether there was any such thing as dower amongst the ancient Northern Nations. (Jus Feud. L. 2. Dieg. 14.) The *Goths* did not allow Dower to exceed a *tenth.* (Wisegoth. L. 3. t. 1. l. 4.)

The *Assises of Jerusalem* gave a *half*, (c. 187.)—the same portion as the Laws of the Ancient Duchy of *Burgundy*—(Chass.

that which any free man at the time of his being affianced,[1] gives to his Bride at the Church Door.[2] For every Man is bound as well by the Ecclesiastical Law, as by the secular, to endow his Bride, at the time of his being affianced to her. When a man endows his Bride, he either names the Dower, or not. In the latter case, the third part of all the Husband's freehold Land is understood to be the Wife's Dower; and the third part of all such freehold Lands as her Husband held, at the time of affiancing,[3] and of which he

consuet. ducat. Burg. rub. 4. s. 6. col. 580.) The *Saxons* (LL. tit. 8.) *præter dotem quam in nuptiis adepta est*, allowed the *half* of what the Husband and Wife subsequently acquired. A Law of Edmund gave the *half*. (LL. Edm.) The *Longobardi* allowed Dower to extend to the *fourth* part. (L. 2. tit. 4.) The *English*, the *Scotch*, and the *Normans*, following in this respect the *Sicilians* and *Neapolitans*, have allowed Dower to extend to a *third*. (Vide LL. Hen. 1. 70. Ed. Wilkins.—Le Grand Custum. de Norm. c. 102.—the Regiam Majm. L. 2. c. 16.)

[1] *Tempore desponsationis*. *Affiance* and *Marriage* seem to be perfectly distinct things in the Civil and Canon Laws. (Vide Lyndw. Provinc. 271.) but our law books, it is said, use the terms promiscuously, as being synonymous. (See Co. Litt. 34. a. and Mr. Hargrave's note.)

[2] *Or at the Door of the Monastery*, say the Mirror and Lord Coke. (Mirror. c. 1. s. 3. Co. Litt. 34. a.) The reason for requiring the endowment to be made at the door of these places was to give publicity to the transaction. (Bracton 92. a. Fleta. L. 5. c. 23.)

[3] *Tempore matrimonii* is the expression of the Grand Norman Customary, (c. 102.) and of the Regiam Majestatem (L. 2. c. 16.) and *die quo eam desponsavit* is the language of Bracton (92. a.) and Fleta (L. 5. c. 24.) notwithstanding that the 7th chapter of Magna Charta enlarged the widow's claim to a third part of all such lands as the Husband is seised of *in vita sua* or, as it has been translated, *during the coverture;* and thus it has stood ever since, though not without having been materially encroached upon, by the comparatively modern doctrine of *Trusts*.

was seised in his Demesne, is termed a Woman's reasonable Dower. If, however, the Man name the Dower, and mention more than a third part, such designation shall not avail, as far as it applies to the quantity. It shall be reduced by admeasurement to the third part;[1] because a Man may endow a Woman of less, but cannot of more, than a third part of his Land.[2]

CHAP. II.

SHOULD it happen, as it sometimes does, that a man endows a Woman, having but a small freehold at the time of his being affianced, he may afterwards enlarge her Dower to the third part or less of the Lands, he may have[3] purchased.

But if upon the Assignment of Dower, no mention was made concerning purchases, even admitting that at the time of affiance he possessed but a small Estate,

[1] For this purpose our Author gives us the form of a Writ, Chapter 18th of the present Book.

[2] "Lest, by such liberal endowments, the Lord should be defrauded of his wardships and other feudal profits." (2 Bl. Com. 133. See also Grand Cust. de Norm. c. 18.) It is a remarkable peculiarity of Legislation, that the same Law is frequently the result of principles the most different—thus, the modern French code tells us, that it will not allow the Dowry to be augmented during the marriage. (Code Napoleon s. 1543.)

[3] *Questus*, more properly, says Spelman, *quæstus* from *quæro*, purchased Lands, contradistinguished to Lands acquired by inheritance. (Vide Spelm. Gloss. ad voc. and Co. Litt. 18. a.) purchased Lands were designated under the feudal Law by the *feudum novum*. (Craig Jus feud. L. 1. Dieg. 10. s. 18.)

and that he afterwards much increased it, the Wife cannot claim as Dower more than a third part of such Land as her Husband held, at the time of being affianced, and when he endowed her. The same Rule prevails if a Man, not being possessed of any Land, should endow his Wife with his Chattels,[1] and other things, or even with Money. Should he afterwards make considerable purchases in Land and Tenements, the Wife cannot claim any part of such property so acquired by purchase; it being, with respect to the quantity or quality of the Dower assigned to any Woman, a general principle, that if she is satisfied to the extent of her endowment at the door of the Church, she can never afterwards claim as Dower any thing beyond it.[2]

[1] It is curious to observe the fluctuations of Law. Though Glanville in the text expressly lays it down, that a Woman may be endowed of chattels, or money, which, indeed, could have been the only mode of endowing in the still more distant ages of Antiquity, yet this was denied to be law in the Reign of Henry the fourth, (7. H. 4. 13. b.) The Doctrine of the Courts of Equity in the present day, in admitting equitable bars, seems, in point of substance, to revive the law as laid down by Glanville. The doctrine of the text is confirmed by the Regiam Majestatem, and Fleta: but the latter informs us, that Dowers, of the kind now under discussion, were only so far to be recovered, as the chattels of the deceased extended. (L. 5. c. 23.) Hence probably they fell into disuse.

[2] "*Si enim mulier, quando ducta fuerit in uxorem, concessit et consensit se dotari del mobili vel de terra specificata, illud ei debet post decessum mariti sui sufficere, quod in contractu matrimonii concessit se pro dote recipere et consensit.*" (Le Grand Coustoum. de Normand. c. 102.) "Because she was first content therewith," is the reason the Reg. Maj. gives why she should afterwards be confined strictly to the original designation. (L. 2. c. 16.)

CHAP. III.

It should be understood, that a Woman[1] cannot, during the life of her Husband, make any disposition of her Dower.[2] For since the Wife herself is in a legal sense under the absolute power of her Husband, it is not singular, if the Dower, as well as the Woman herself and all other things belonging to her, should be considered to be fully at the disposal of the Husband. But any one, having a Wife, may either give or sell her Dower, or, by any other mode he pleases, may alienate it in his lifetime; so that the Wife shall be bound to conform to his will in this as in all other respects which are not contrary to the Law of God. And so far is the Woman bound to obey her Husband, that if her Husband chuses to sell her Dower, and she refuses her consent, and the Dower be afterwards sold and bought under these circumstances, the Wife cannot[3] after the death of her Husband claim her Dower

[1] *Mulier* is the expression which our Author generally uses, to designate the Wife: but, as Lord Coke informs us, this Term was anciently taken for a wife. (2. Inst. 434.)

[2] For which Rule Bracton gives two reasons: 1*st*. Because the woman has no freehold in her Dower, previously to its being assigned. 2*ly*. Because she cannot gainsay her Husband. (Bracton 95. b.)

[3] I have followed all the MS. and the Edition of Glanville published in 1604, in admitting *not* into the text. I submit, that this Reading is sanctioned not merely by the previous part of this present chapter, but also by the 13th chapter of the present Book. Yet the *Regiam Majestatem* makes the validity of such a sale to depend upon the wife's consent—but, if she made no op-

as against the Purchaser, if she confess in Court or is convicted upon the fact that, although she opposed her Husband, the Dower was sold by him.

CHAP. IV.

Upon the death of the Husband of a Woman, her Dower, if it has been named, will either be vacant or not.

In the former case, the woman may, with the consent of the Heir, enter upon her Dower,[1] and retain the

position to it, it seems to have been tantamount to a positive consent. (L. 2. c. 15. 16.) From considering the 13th Chapter of the present Book, one thing seems clear—that in case the Husband disposed of his Wife's dower, the Heir was bound to render an equivalent to the Purchaser, if the Land was recovered from him, or to the wife, if it was not so. As to the Heir, therefore, it was immaterial; and so it perhaps might be considered with respect to the Wife and the Purchaser, in case the Heir, as Heir, were solvent; but if otherwise, it was highly material to ascertain, whose right, that of the wife or that of the purchaser, was paramount. Bracton is more explicit than our Author; and from him we collect, that a distinction should be made, whether the Dower was originally *named*, or not. In the *former* case, the woman could pursue the identical Dower, and wrest it from the hands even of a Purchaser. In the *latter* she was obliged to resort to the Heir for an Equivalent. In the first case, from the moment the dower was named, the woman acquired a certain *jus et dominium* as Bracton expresses it, in the property, which accompanied it into whatever hands it afterwards went, and gave her the right of following and reclaiming it. But, if the endowment were general, and no particular land specified, the Wife did not acquire any immediate right, on account of the uncertainty; it being questionable, what identical allotment would fall to her share, until the assignment took place. (Bracton 300. b.)

[1] It seems, that the Widow took possession of the property in the same state in which it existed at the death of her Husband,

possession of it. If, however, the Dower be not vacant, either the whole will be so circumstanced, or some part will be vacant, and some not. If a certain part be vacant, and a certain part not, she may pursue the course we have described, and enter into the part which is vacant; and for the residue, she shall have a Writ of Right, directed to her Warrantor[1] in order to compel him to do complete Justice concerning the Land, which she claims as appertaining to her reasonable Dower, which Writ shall be as follows:—

CHAP. V.

"THE King to *M.* Health.[2] I command you that, "without delay, you hold full right to *A.* who was "the Wife of *E.* of one Hyde of Land, in such a Vill, "which she claims to belong to her reasonable Dower, "which she holds of you in the same Vill by the free "service of ten shillings, by the year, for every service, "of which *N.* has deforced her: and unless you do so, "the Sheriff shall,[3] least she should any more complain, "for want of Justice. Witness &c."

whether in cultivation, or otherwise, with the fruits, returns, and all other things appertaining to it. (Bracton 98. a. Fleta L. 5. c. 24. s. 2.)

[1] Namely, the Heir of her Husband. (Vide Reg. Maj. L. 2. c. 16.)

[2] Vide F. N. B. 18.

[3] Among the Constitutions of the Ancient kings, the Mirror informs us, "it was ordained, that after a Plaint of wrong be "sued, that no other have Jurisdiction in the same place, before "the first Plaint be determined: and from thence came this "clause in a Writ of Right, *Et nisi feceris vicecomes faciat.*" (Mirror c. 1. s. 3.)

CHAP. VI.

THE Plea shall be discussed in the Court of the Warrantor by virtue of this Writ, until it be proved that such Court has failed in doing Justice, concerning the nature of which, we shall speak in another place.[1] Upon proof of this, the Suit shall be removed into the County Court, through the medium of which, the Suit may, at the pleasure of the King or his Chief Justiciary, be lawfully transferred to the King's Court by the following Writ:[2]—

CHAP. VII.

"THE King to the Sheriff, Health. Put before me "or my Justices, on such a day, the suit which is in "your County Court, between *A.* and *N.* concerning "one Hyde of Land in such a Vill, which the said *A.* "claims against the aforesaid *N.* as her reasonable "Dower. And Summon, by good Summoners, the "aforesaid *N.* who holds that Land, that he be then "there with his Plea. And have there," &c.

[1] V. Infra L. 12. c. 7.

[2] "The Feme, who is Demandant, may remove the same by a "*Tolt* into the County; and also may remove the same out of "the County into the Common Pleas by a *Pone, &c.* without "shewing any cause in the Writ, as the Demandant shall do in a "Writ of Right Patent." (F. N. B. 15.)

CHAP. VIII.

Pleas of this description, as, indeed, some others, may be transferred from the County Court to the supreme Court of the King for a variety of Causes: as, on account of any doubt which may arise in the County Court concerning the plea itself, and which that court is unable to decide; (and when any suit is thus transferred to the Court, then both parties, as well the Tenant as the Demandant, shall be summoned.) But, when it has been removed upon the Petition of one of the parties, it will then suffice, if that party be summoned who did not require the removal: but, if the suit should be transferred to Court by the consent and prayer of both parties, being present in Court together, then, neither party ought to be summoned, because the day appointed in Court is known to both of them. Upon the day appointed in Court, either both parties will be absent, or only one will be so, or both will appear. We have already sufficiently treated concerning the absence of both, or of one only of the parties. If both be present in Court, the Woman shall set forth her claim against her Adversary in the following words. "I demand "such Land, as appertaining to such Land, which was "named to me in Dower, and of which my Husband "endowed me at the door of the Church, the day he "espoused me, as that of which he was invested and "seised at the time when he endowed me."[1]

[1] It is thus as literally set down in the Translation of the

Various are the Answers which the Adverse party usually gives to a claim of this kind; in substance, however, he will either deny that she was so endowed, or concede it.

But, whatever he may allege, the Suit ought not to proceed, without the Heir of the Woman's Husband. He shall, therefore, be summoned to appear in Court to hear the Suit, by the following Writ:—

CHAP. IX.

"The King to the Sheriff, Health. Summon, by good "Summoners, *N.* the Son and Heir of *E.* that he be "before me, or my Justices, on such a day, to warrant "to *A.* who was the Wife of the said *E.* his Father, one "Hyde of Land in such a Vill, which she claims to be- "long to her reasonable Dower of the Gift of the said "*E.* her Husband, against *N.* and of which there is a "Suit between them in my Court, if he will warrant "that Land; or to shew to her why he ought not to "do so. And have there &c. Witness &c."

CHAP. X.

Should the Heir, after having been summoned, neither appear, nor essoin himself, on the first, second,

Regiam Majestatem.—"I claim sic Land, as ane part and per- "tinents of that Land named by my umquhill Husband for my "Dourie, quherewith he indowed me at the kirk dore, the "samine day when he married me, wherein he was vest and "saised at the time he indowed me therewith." (L. 2. c. 16.)

nor third day; or if, after having cast the usual Essoins, he should on the fourth day, neither appear nor send his Attorney, it may be a question, by what means he ought or can be distrained, consistently with the Law and Custom of the Realm. In the opinion of some, his appearance in Court, shall be compelled, by distraining his Fee.[1]

And that, therefore, by the direction of the Court so much of his Fee[2] shall be taken into the King's hands as may be necessary to distrain him to appear in Court to shew, whether he ought to warrant the Land in question or not. Whilst others[3] think, that his appearance in Court for such purpose may be effected, by attaching him by Pledges.

CHAP. XI.

When, at last, the Heir of the Husband of the Woman, the complainant, appear in Court, either he

[1] He may, according to the Regiam Majestatem, be distrained, or attached by Pledges. (L. 2. c. 16.)

[2] *Feodum.* This word, which has frequently occurred in our progress through Glanville, has given the name to a system. The reader has no doubt perused Mr. Justice Blackstone's account of it, (2 Comm. 44.) and the luminous Annotation which Mr. Butler has subjoined to Co. Litt. (Note to 199. a.) It may not be amiss briefly to mention the leading divisions of Feuds, as the Reader in the course of these pages will find some of these divisions mentioned, and others alluded to. 1. *In proprium et Improprium.* 2. *In francum et non francum.* 3. *In masculinum et femininum.* 4. *In reale et personale.* 5. *In laicum et ecclesiasticum.* 6. *In antiquum et novum.* 7. *In nobile et ignobile.* 8. *In ligium et non ligium.* 9. *In simplex et conditionatum.* 10. *In divisibile et Indivisibile.* (Craig de Jur. Feud. *sparsim.*)

[3] Namely, says Dr. Milles's MS. Hugh Bardolph.

will affirm the fact, and concede that the Land in question appertains to the Dower of the Woman, and that she was endowed of it, and that his Ancestor at the time he endowed her was seised of it as an appurtenant to the Land which he named in chief, as her Dower, or, he will deny it. If the Heir admit this in Court, he shall then be bound to recover the Land against the Tenant, if he be disposed to dispute the matter, and then deliver it to the woman; and thus the contest will be changed into one between the Tenant and the Heir.

If, however, the Heir be unwilling to contest the point, he shall be bound to give to the Woman a competent equivalent; because, the Woman herself shall not afterwards sustain any loss. But, if the Heir himself neither admit nor concede to the Woman that which she alleges against the Tenant, then, the suit may proceed between the Woman and the Heir. For a Woman cannot with Effect bring an Action against any one, without the Warrantor of her Dower.[1] If, therefore, the Heir should absolutely deny the Right of the Woman, alleging in Court, that she never was endowed by his Ancestor, the matter may be decided by the Duel, provided the Woman produce in Court those who heard and saw the Endowment, or any proper Witness who may have heard and seen the fact of her

[1] For, as the Regiam Majestatem adds, "the king's writ is of "no force, unless the warrantor be summoned." (L. 2. c. 16.) The Bodleian, Harleian, and Cottonian MS. add, *that the woman is not bound to answer, without her warrantor.*

being endowed by the Ancestor of the Heir at the Church door, at the time of the Espousals, and be ready to prove such fact against him.

Should the Woman prevail against the Heir in the Duel, then the Heir shall be bound to deliver the Land in question to the Woman,[1] or to give her an adequate recompense.

CHAP. XII.

It should be observed, that when any one endow his Wife in these words. "I give to thee this Land, or "Vill, by name, with all its appurtenances"—if, at that period, he held not any thing appurtenant to it in his Demesne, nor of which he was seised at the time of his Espousals, and he in his lifetime recover it, or by any other lawful means acquire it, the Wife, after the death of her Husband, may, by the Law of Dower, justly demand such appurtenant, together with the other property of which she was endowed.

[1] The Dower being assigned, says Bracton, it shall, in every sense of the word, be enjoyed freely ; and the wife shall not be compelled to contribute any portion of it, towards discharging the Debts of her Husband, which entirely devolve upon the Heir. The Heir shall warrant and defend the Dower, and perform the judicial services that may be due in respect of it, to the County, the Hundred, or the Lord's Court ; whilst the widow, exempt from every other care, devotes her attention solely to the management of her domestic affairs, and to the education of her children.—She shall, however, have her own court. (fo. 98. a.) So effectually were the convenience, the interest, the dignity, of the widow attended to when Bracton wrote ! !

CHAP. XIII.

It must also be understood, that if the Husband of any Woman, after having endowed her as his Wife, should sell her Dower to any one, his Heir shall be obliged to deliver the Dower to the Woman, if he possibly can; at the same time he shall be bound to render a reasonable equivalent to the Purchaser, on account of the Sale, or Gift of his Ancestor.[1] If, however, the Heir be unable so to do, he shall be bound to make to the woman a reasonable compensation.

CHAP. XIV.

When the Dower of a Woman happen to be so circumstanced, that she is prevented from obtaining any part of it, then, the suit shall from the beginning be carried on in the King's Court, and the person in possession of the Dower shall be summoned, by the following Writ:—

CHAP. XV.

"The King to the Sheriff, Health.[2] Command *N.* "that, justly and without delay, he cause *A.* who was "the Wife of *E.*, to have her reasonable Dower in such

[1] An Assignment of Dower carries with it an obligation of warranty under the modern French code. (Code Napoleon, 1547. 1564.)

[2] Vide F. N. B. 329.

"a Vill, which she claims to have of the Gift of the "said *E.*, her Husband, and of which she has no part, "as she says; and of which she complains that he has "unjustly deforced her; and, unless he does so, sum- "mon him, by good Summoners, that he be, on such a "day, before us, or our Justices, to shew wherefore he "has not done it; and have there, &c. Witness, &c."

CHAP. XVI.

Whoever happens to be in possession of the Dower, whether the Heir or another person, the Heir ought always to be present to answer the Woman claiming her Dower. If, therefore, a stranger, and not the Heir, deforce the Woman of her Dower, he shall be summoned by this Writ; but the Heir shall be summoned by the former Writ.

CHAP. XVII.

The suit between the Heir and the Widow, may be infinitely varied. For the Woman will either claim her Dower, as named, or her reasonable Dower as not named. The Heir also may admit that her Dower was named, but that it differs from that she demands; or he may allege, that no Dower was specified.

If the contest between them be concerning Dower which was named, or concerning different nominations

of it, then, the Plea may proceed in the manner we have above described. But if a reasonable Dower be demanded, no specific nomination having been made, the Law is perfectly clear, that the Heir is bound to assign to the Woman as her Dower, a third part of all the freehold Tenements that his Ancestor held in his Demesne, on the day of the Espousals, and this unreservedly, in every thing, as in Lands, and Tenements, and Ecclesiastical Advowsons,[1] so that if there should be but one Church in the whole Inheritance, and such happen to fall vacant in the life of the woman, and after the death of her Husband, the Heir shall not, without the Assent of the woman, present a Parson to such Church. From the generality of this Rule we must except the Capital Messuage, which cannot be given in Dower, nor can it be divided, but shall remain entire.[2] Nor shall a division be made of those things which other women, who have been previously en-

[1] Vide Bracton, 97. a. where the doctrines of the text are corroborated, and the additional improvements laid down.

[2] Yet, from the form of the writ, book 12. c. 20. as given by our author, we may collect, that the Land assigned to the Widow, as her Dower, was to have a messuage upon it, unless, as the Writ says, land had been, in the first place, specifically nominated, on which there was no messuage. This inference is corroborated by Bracton. (97. b.) It was certainly a qualification of the severity of the Rule, which would turn the Widow out of that House she might possibly long have occupied with her Husband as its mistress. The Widow had further advantages under the 7th chap. of Mag. Car. These different regulations in favor of the widow, tended to restore the common Law as it stood in the Reign of Canute. *Ubi Maritus habitavit absque lite et absque controversia, habitent uxor et infans ubique absque lite.* (LL. Canuti, 70. Ed. Wilkins.)

dowed, still hold in Dower.[1] Besides, if there should be two or more Manors to be divided, the Chief Manor shall not be divided, but, together with the capital Messuage, shall remain entire to the Heir, so that the Widow shall be fully satisfied from the other Manor or Manors. It should also be remarked, that the Assignment of the Dower shall not be postponed, on account of the Infancy of the Heir. In addition, should any Land have been given by name to a Woman, in Dower, and should a Church have been founded in that Fee, the Woman, after the death of her Husband, shall have the free Presentation; so as to have it in her power, in case such Church should become vacant, to bestow it upon any proper Clerk.[2] But she cannot confer it upon a College,[3] because, by so doing, she would for ever destroy the Right of the Heir.

But if the Husband of the woman happen in his lifetime to bestow the Church upon the Clerk, the latter shall, during the whole of his life, retain such Church; although he were presented subsequently to the period when the woman was endowed of that Land. If, however, the Husband should, in the interval, bestow the Church upon any religious House, the Church ought, after the death of the Husband, to be delivered to his Widow, so that in the course of her life she may have

[1] "The great Third," says Skene, "shall not be computed, in "the division of a second third." (Reg. Maj. L. 2. c. 16.)

[2] "Qualified Clerk, in life and literature." (Reg. Maj. L. 2. c. 16.)

[3] "Seeing," adds Skene, "a College never dies." (Reg. Maj. L. 2. c. 16.)

a free Presentation.[1] But, after the death of the woman, and of the Clerk instituted Parson upon her Presentation, the Church shall revert to the religious House, and shall for ever after so remain. It may also be observed, that if the wife should, in the lifetime of her Husband, be separated from him on account of incontinence, the Woman shall not be heard upon a claim of Dower.[2] The same rule prevails, if she be separated from him on account of Relationship [3]—she shall be debarred from claiming her Dower. And yet her children may inherit, and, by the Law of the Realm, shall succeed to their Father by hereditary Right.[4]

[1] "If the Husband gave the Church to any Religious House, "after his decease his Heir shall deliver the church to the Wife, "so that during all the days of her life she may have the right of "Presentation thereof." (Reg. Majest. L. 2. c. 16.)

[2] From a Law of Edmund, which is in every sense of the word a most singular specimen of legislation, the translator makes the following extract:—*Si eam* (the wife) *ex terra illa ducere velit in alterius Thani regionem, tunc sponsio ipsius sit quam Amici paciscantur, ut Maritus ejus nullam illi injuriam inferat, et si illa delictum commiserit, ut possint esse propinquiores emendationi, si illa non habeat unde compenset.* (LL. Edm. Ed. Wilkins.) This was certainly a more polite mode of proceeding than Canute allowed. Under his Law, the wife, if guilty of the offence in the lifetime of her Husband, became infamous, forfeited every thing she possessed to her Husband, and lost both her nose and ears. (LL. Canuti—Ibid.)

[3] *Parentelam*, (vide Spelm. Gloss. ad voc. *parentes*.) "Paren-"tage and sibness of blude (within degrees defended and for-"bidden,") (Reg. Majest. L. 2. c. 16.)

Divorce, generally, is a bar to Dower under the Norman code. (Le Grand Custum. de Norm. c. 102.)

[4] Upon this Rule of Law, Lord Littleton observes, "as the Ca-"nonical prohibitions extended so far, that divorces frequently "happened, after a cohabitation of many years in a state of wed-"lock supposed lawful, there was much humanity and equity in

Observe also, that when the Son and Heir of any one marries, with the consent of his Father, and, by the Assignment of his Father, endow his Wife with a certain part of the Land of his Father,[1] it may be questioned whether the Wife can demand any more as dower?[2] If her Husband die previously to his Father, it may be doubted, whether she can retain the Land in question, as her Dower, and whether the Father of her Husband be bound to warrant such Land to her?[3] If

"this Law," especially as his Lordship had just observed "such a "separation supposed a nullity in the marriage, and the children "must in strictness have been bastardised by it," had it not thus have been tempered and relaxed. (3 Litt. Hist. Hen. 2. p. 126.)

A similar Law forms part of the Modern French code, though clearly the result of different principles—"Dissolution of mar- "riage by Divorce, allowed at Law, shall not deprive the chil- "dren born of the marriage of any of the advantages which were "assured to them by the Laws, or by the marriage contracts of "their Father and Mother." (Code Napoleon, s. 304.)

[1] According to the Norman Code, if the Husband, at the time of the marriage, had no Fee, but his father or Grand-father had been present and consented to the marriage, the wife might be endowed out of the Land of the Father or Grand-father, provided there were no other Heirs: if, however, such Father or Grand-father had other Heirs, then, she was to be endowed out of the portion descending to her Husband. But, if the Father or Grand-father did not consent to the marriage, she was entitled to no Dower out of their Lands. (Le Grand Coust. de Normand, c. 102.)

[2] This is put as a question in the printed text, although the Cottonian and Dr. Milles's MS. assert it absolutely, that the wife *cannot* claim any more in Dower than that of which she has been so endowed. That the printed text is correct seems probable: for we can scarcely suppose the doctrine in question was settled when that contained in the next following passage was unsettled.

[3] The Regiam Majestatem lays it down, that the Father of the Husband shall be compelled to warrant the same to her. (L. 2. c. 16.) Vide Co. Litt. 35. a.

a woman have more Land in Dower than she ought, that is, more than belongs to her, let the Sheriff be commanded to admeasure it, and for this purpose the following Writ shall issue——

CHAP. XVIII.

"The King to the Sheriff, Health.[1] *N.* complains to "us, that *A.* his Mother, has more in Dower of his In- "heritance, than she ought to have, and than belongs "to her to have, to wit, her reasonable Dower. There- "fore, I command you, that justly and without delay, "you cause it to be admeasured; and that, justly and "without delay, you cause the said *N.* to have what he "ought of right to have of his inheritance; and, justly "and without delay, cause the said *A.* to have what "she ought to have, and what belongs to her to have, "to wit, her reasonable Dower, least he should again "complain for want of Justice. Witness, &c."

[1] Vide F. N. B. 331.

Book VII.

OF LAWFUL HEIRS, AND BASTARDS, MALE OR FEMALE, OF FULL AGE OR MINORS; AND OF THE CUSTODY AND PRIVILEGE OF MINORS; AND CONCERNING ULTIMATE HEIRS, WHO ARE THE LORDS WHEN THE FEE FALLS INTO THEIR HANDS; AND OF THE HEIRS OF INTESTATES; AND OF USURERS, AND THEIR HEIRS; AND OF MARRIAGE-HOOD AND OTHER THE DONATIONS OF ANCESTORS; AND OF THEIR TESTAMENTS AND DEBTS, ALL WHICH THEIR HEIRS ARE BOUND TO WARRANT.

CHAP. I.

The term Dower is received in a different acceptation in the Roman Code, according to which, that portion which is given to a Man with a Woman is, properly speaking, termed Dower; but this corresponds with what is usually called, Marriage-hood.[1] (Every

[1] *Maritagium.* This Term is explained by our Author more fully in the 18th chapter of the present Book. Lord Coke translates the word, *marriage:* but, to avoid a confusion of ideas, I have rendered it, *marriage-hood.* The term *maritagium* appears to have been employed by our ancient writers in three senses. 1. To designate marriage, in the modern sense of the Term. 2. To import Land given with a Woman in marriage; such *maritagium* being either *liberum*, or *servitio obnoxium*, as we shall presently see. 3. To mean the right which a Lord had of disposing of his ward in marriage. (Bracton, 21. a. Spelm. Gloss. ad voc. 2 Bl. Comm. 69. Co. Litt. 21. b. 76. a. and Mag. Car. c. 7.)

free-man possessed of Land may give a certain part of it with his Daughter, or with any other Woman, in Marriage-hood, whether he has any Heir, or not; or whether his Heir, supposing he has one, consent to such a disposition, or not—nay, though the Heir expressly dissent from, and forbid it. Every one may also give a certain part of his freehold Estate[1] to any person he chuses, in remuneration of his services, or to a religious Establishment in Free-Alms;[2] that, if seisin follow up the Donation, the Land shall perpetually remain to the person to whom it is given and his Heirs, if the terms of the Gift go to that extent. But, if such a Donation should not be followed up by seisin, nothing can, after the death of the Donor, be claimed with effect in virtue of it, contrary to the will of the Heir; because such a disposition is usually interpreted by the Law of the Realm, rather as a naked promise, than a real promise or donation. Though it is thus, generally speaking, lawful for a man, in his lifetime, freely to dispose of the reasonable part[3] of his Land,

[1] The Assises of Jerusalem permitted a Fief to be dismembered, if it consisted of more Knight's Fees than one, but not otherwise. (c. 265.)

[2] *Poterit etiam Donatio in liberam eleemosinam, sicut, ecclesiis, cathedralibus, conventualibus, parochialibus, viris religiosis.* (Vide Bracton 27. b.) "Originally when Lands were given to "the church, they were burdened with military service; this "service the Bishop or Abbot performed in some ages by him-"self, and in others by a delegate: but, when the necessity for it "became less, people, in giving Lands to the church, exacted "no other return than Prayers and such religious Exercises." (Dalrymple's Essay on Feuds, p. 30.)

[3] It does not appear from Glanville what was considered as this *reasonable part*. In speaking of the Constitutions of the

in such manner as he may feel inclined, yet the same permission is not allowed to any one on his death-bed; because the distribution of the Inheritance would, probably, be then highly imprudent,[1] were such an indulgence conceded to men, who, in the glow of a sudden impulse, not unfrequently lose both their memory and reason.

Hence, it is to be presumed, that if a Man laboring under a mortal disease, should then for the first time set about making a disposition of his Land, a thing never thought of by him in the hour of health, that the act is rather the result of the Mind's Insanity than of its deliberation. But yet a Gift of this description,

ancient kings, the Mirror tells us, that "none might alien but "the fourth part of his Inheritance, without the consent of his "Heirs." (c. 1. s. 3.) Whether this removes the difficulty, is for the Reader to decide. The 32nd chapter of Mag. Car. intended to provide a remedy for the abuse of the indulgence stated in the text—which was again affected by the Statute of *quia Emptores*. The modern French code restrains a gift to the moiety of a man's property, if he leaves one child—to a third of it, if he leaves two—and to a fourth if he leaves three children. Nor does it seem that a man is free from restraint, though he have no child, provided he has Relatives, either Ascendants or Descendants. But, in default of all these, the restraint ceases, and a man may dispose of the whole of his property. (Code Napoleon, s. 913. 914. 915.)

[1] "And some have questioned," says Justice Blackstone, "whether this restraint, which we may trace even from the an- "cient Germans, was not founded upon truer principles of pol- "icy, than the power of wantonly disinheriting the Heir by "will, and transferring the Estate, through the dotage or caprice "of the Ancestor, from those of his blood to utter strangers. "For this, it is alleged, maintained the balance of property, and "prevented one man growing too big or powerful for his neigh- "bours." (2 Bl. Comm. 373.)

if made to any one by the last Will, shall be valid, if done with the consent of the Heir, and confirmed by his acquiescence in it. When a Man gives part of his Land in Marriage-hood, or in any other manner, his Land consists either of that which is inheritable only, or of that which he has purchased only, or of both descriptions. If he possess inheritable Land only, he may, as we have already observed, give a certain portion of it to any stranger at his pleasure.[1] But if he has many sons born in Wedlock,[2] he cannot, correctly speaking, without the consent of his Heir, give any part of his Inheritance to a younger son; because, if this were permitted, it would then frequently happen that the Eldest son would be disinherited, owing to the greater affection which Parents often feel towards their younger children.

But, it may be asked, whether a man, having a Son and Heir, can give any part of his Inheritance to his illegitimate son? If he can, it follows, that the condition of the illegitimate son would, in this respect, be preferable to that of the younger son born in Wed-

[1] A liberty that he was not indulged in by the Laws of Alfred, unless under particular circumstances: (LL. Alfred, c. 37.) nor by the Laws of Henry the 1st was this indulgence conceded a Man. *Si Bockland habeat, quam ei parentes dederint, non mittat eam extra cognationem suam.* (LL. Hen. 1. cap. 70.)

[2] *Filios mulieratos.* "When a Man has a Bastard Son, and "afterwards marries the Mother, and by her has a legitimate "Son, such latter Son, in the language of the Law, is called a "*mulier*, or, as Glanville expresses it in his Latin, *filius mulie-*"*ratus.*" (2 Bl. Comm. 247.) With this interpretation *Skene* agrees. (Reg. Maj. L. 2. c. 19.)

lock; and yet the Law is so.[1] But, if the person, desirous of making a donation of part of his Lands, possess only such as he has purchased, he may then make such Gift; provided it does not extend to the whole of his purchased Lands, because he cannot disinherit his Son and Heir.[2] Yet, if he has not any Heir, male or female, of his own Body, he may, indeed, consult his own inclination in making an absolute gift, either of part or of the whole of his purchased Lands.[3] And, if the person to whom the gift be made obtain Seisin of it, during the life of the Donor, it is not in the power of any more remote[4] Heir to invalidate such

[1] The *Regiam Majestatem* lays it down, that a man *cannot* give any part of his Inheritance to his illegitimate Son. (L. 2. c. 19.) The Grand Norman Custumary also expressly denies the validity of a gift, sale, delivery, or pledge, by a Father, to his illegitimate Son of any part of the former's hereditary Estate, adding that it might be impeached within a year and a day after the Father's decease. (Le Grand Custum. de Norm. c. 36.) We must recollect that both these celebrated works were *posterior* to Glanville—the Law, therefore, had, in the point now before us, undergone some alteration in the intervening period.

[2] Vide Sullivan's Lectures on the Laws of England, p. 149.

[3] It is observed by a justly celebrated writer that, in the old restraints upon alienation, which we find in the Laws of England and Scotland, no distinction is made, whether the fief was held by a military or soccage tenure; and that, in the same old Laws, the restraint upon alienation is almost absolute, where the Tenant is in by descent, but very loose when he is in by purchase; and the writer in question concludes that, the *Interest of the Heir* created the difference. (Vide Dalrymple on Feuds p. 80.) The writer just mentioned furnishes an excellent comment upon this part of our Author. (c. 3. s. 1.)

[4] *Hœres remotior.* *Hœres remotior* has a peculiar signification in our Author. Except a Son and Daughter, who were *Hœredes proximi*, every Heir was *hœres remotior*. See cap. 3. of this Book. No Heir, says the Reg. Maj. being of farther degree than

Gift. Thus may a man give, in his lifetime, the whole of his purchased Land; but he cannot make any one his Heir to it, neither a College, nor any particular individual, it being an Established Rule of Law, that God alone, and not Man, can make an Heir.[1] If, however, a Man possess both inheritable and purchased Lands, it is then unquestionably true, that he may absolutely give any part or the whole of the latter to such person as he pleases;[2] and of his inheritance he may notwithstanding dispose, according to what we have already observed, provided such disposition be a reasonable one. It should be observed, that, if a Man, having Lands in free soccage,[3] has many sons, who are all in equal proportions to be admitted to the In-

the son or daughter, may impugn that gift any manner of ways. (L. 2. c. 20.)

[1] Vide Craig de Jure Feud. p. 349. 354. 368. and also Somner on Gavelkynd.

[2] *Primo patris feudum primogenitus filius habeat: Emptiones vero vel deinceps acquisitiones suas det cui magis valit.* (LL. Hen. 1. cap. 70.)

[3] *Socagium. Dici poterit soccagium a Socco.* (Bracton L. 2. c. 35.) *Hinc est quod Sokemanni hodie dicuntur esse a succo etiam derivantur.* (Fleta L. 1. c. 8.) *Socagium idem est quod servitium socæ, et soca idem est quod caruca s. a soke* or *a plough.* (Littleton s Tenures Sect. 119.) This derivation Lord Coke approves of (Co. Litt. 86. a.) See also Cowell ad voc. Mr. Somner, however, disapproves of it, as too confined. He would derive it from the Saxon *Soc*, which signifies liberty or privilege, and *agium* to denote the *agenda* or Services (Somn. Gavelk. 133. See also Bl. Com. and Mr. Christian's note 2. 81.) "It seems," says Mr. Hargrave, "that both derivations have their share of "probability, which is as much as can be expected on a subject "so very uncertain." Mr. Somner tells us, that the term socage has first occurred to him in Glanville, but never as yet in any Elder record. (Gavelk. p. 143.)

heritance, then, it is unquestionably true, that their Father cannot give a greater part of his inheritable Land or of his purchased, if he possess no inheritable, to any one of the sons, than the reasonable part which would fall to such son of the whole paternal Inheritance.[1] But the Father can in his lifetime give to either of his Sons such a part only of his inheritable free soccage Land, as such son would be intitled to upon the death of his father by the Rule of succession. Yet, by reason of the liberality which Parents are in the habit of exercising towards their sons, or even towards other persons, questions of Law frequently arise concerning donations of this description. Let us suppose, that a Knight or a free-man, having four, or a greater number of sons, all born in Wedlock of one Mother, should, with the consent of the Heir previously obtained, (in order to prevent disputes) give to one of his sons—let us say, to the second and his Heirs, a certain reasonable part of his Inheritance—Let us suppose, that the son, to whom the Gift has been made, received Seisin, and, during his Life, took the profits and proceeds, and that he died in such Seisin, leaving not only his Father, but all his Brothers yet living.

Very obscure, indeed, is the Law, and considerable the debate and contention among the most skilful of

[1] The Norman Code lays down the same rule generally, and observes, that after the Father's Death, any such Gift should be brought into the general stock and divided amongst all the Heirs; in other words, should be put into Hotch-pot. (Le Grand Cust. de Norm. chap. 36.)

that Profession, when this point occurs or may occur in the King's Court, in order to ascertain, who ought by law to succeed to the Inheritance. The Father contends, that he ought to retain to himself the Seisin of his departed son, and thus desires, that the Land which had emanated from his Bounty should again return to him. Upon this question being agitated in Court, the Eldest son will answer to the Father, in the act of claiming the Land, that the latter ought not to be heard upon the subject, as it is a general principle of the Law of the Realm, that no one can be at once Lord and Heir of the same Tenement.[1] But, by force of the same principle, the third son attempts to repel the Eldest son, from the inheritance in question.

For, since the Eldest son is the Heir to the whole Inheritance, he cannot be at once Lord of it and Heir; especially, if the father of the Eldest son happen to be dead, such son would be Lord of the whole Inheritance.

[1] An able writer accounts for this principle by informing us, that the whole feudal system was built on the distinct rights of superior and vassal, and the blending these two characters, without a necessity arising from the feudal relations themselves, in one person, appeared to be blending of contrary qualities together. (Dalrymple's Essay on feuds, p. 177.) Mr. Reeves observes, "that in the times of Glanville and Bracton the reservation of services might be made either to the Feoffor, or to the Lord of whom the Feoffor held; they seem more commonly to have been made in the former manner: thus, every such new feoffment in fee, made a new tenure, and of course created a new manor: and so the Law continued till the statute *quia Emptores* 18. Ed. 1. required feoffments in fee to be made, with reservation of the Services to the chief Lord." (1 Hist. Eng. Law. 106.) See also Hale's Hist. Com. Law. 158.

But, then, by the Law of the Realm, the Land cannot remain to him, for the reason we have mentioned. If, therefore, he cannot retain it absolutely, how can he claim it by the rule of succession? By a parity of reasoning it seems, that the third son shall exclude all the others.

A similar doubt arises, when any one has conceded and given a certain portion of his Land to his younger Brother, and his Heirs. Let us suppose, that the latter dies, without leaving any Heir of his own body, and the former seizes into his own hands the Land of his deceased Brother, as being vacant and within his Fee, against whom his own two sons pray an Assise, concerning the death of their Uncle. Upon the suit proceeding, the Eldest son may plead against his Father, and the youngest son against his Elder Brother, in the manner before mentioned. But it is evident, that the Father cannot by any means, consistently with the Law of the Realm, retain the Land in question, as he cannot at once be Lord and Heir. Nor, indeed, does the Law admit of Land so given again reverting to the Donor, when Homage has followed the Gift,[1] if the person to whom the Gift is made has any Heir, of his own body, or even more remote. Besides, Land which is thus given, like certain other Inheritances, naturally descends to the Heirs by the rule of succession, but

[1] Vide Reg. Majest. L. 2. c. 22. "But at this day," observes Lord Hale, "the law is altered, and so it has been, for aught I "can find, ever since 13 Ed. 1." (Hale's Hist. Com. Law. 229.)

never naturally ascends.[1] Thus the Plea, between the Father and the Eldest son, shall cease—but it shall proceed, between the Eldest son and the youngest, in the manner we have already described.

But, when this last case has occurred in the King's Court, it has sometimes been ordered by the Court, acting upon equitable principles, that the Land so given should remain to the Eldest son, especially if he has not any other Fee in possession, until the paternal Inheritance fall to him. Because, in the mean time, as he is not the Lord of the paternal Inheritance, the Rule, that no one can at once be Heir and Lord, does not stand in his way. But since by the Rule of succession, he must become Lord of that part of the Inheritance,

[1] *Descendit itaque Jus quasi ponderosum quid cadens deorsum.* (Bracton 62. b.) "This Rule," observes Sir Wm. Blackstone "so far as it is *affirmative*, and relates to lineal descents, is almost "universally adopted by all nations;" "but the *negative* branch, "or total exclusion of Parents and all lineal Ancestors from succeeding to the Inheritance of their offspring, is peculiar to "our own Laws, and such as have been derived from the same "original." (2 Com. 209.)

The Reader will recal to mind the material qualification of this Rule, which, though it precludes the Father from taking as Heir to his Son, by an *immediate* descent, permits him to take as Heir to his own Brother, who was Heir to the Son, by *collateral* descent. (Hale's Hist. Com. Law. 216. 336. 2 P. Wms. 613. Mr. Christian's note to 2 Bl. Com. 212.) This appears to coincide with the Rule as qualified by Bracton; for, having laid it down, that an Inheritance never ascends the same way it descends, he proceeds, *a latere tamen ascendit alicui propter defectum heredum inferius provenientium.* (Bracton 62. b. See also Grand Norm. Custum. c. 25.) A different Rule, from that in the text, is laid down in the Laws of Henry the first. *Si quis sine liberis decesserit, pater aut mater ejus in hereditatem succedant, &c.* (LL. Hen. 1. c. 70.)

it may be asked, whether he is not to be considered as Heir of the part in question, when he is Heir of the whole Inheritance? To this we answer, that it is as yet uncertain and in contingency, whether the Eldest son will be the Heir or not. If, indeed, his Father should die before him, then it is no longer doubtful, because he is his Heir. Should it so happen, he ceases to be the Owner of the Land he formerly acquired by succeeding to his Uncle; and, then, such Land shall descend to the younger son, as the right Heir. If, however, the Eldest son should die before his Father, it is, then, equally clear, that he will not be the future Heir of his Father; and, therefore, those two accidents of Law, the Hereditary Right and Dominion [1] never concur in his person. It should be remarked, that Bishops and Abbots cannot, without the consent and confirmation of the King, make an absolute disposition of any part of their Demesnes, their Baronies being held in Frankalmoigne of the Gift of the King and his Ancestors.[2]

[1] *Dominium.* The Civilians, from whom this term seems to have been borrowed, divided *dominium* into the *directum* and the *utile;* the first being, where a person had the propriety, without the profit,—the latter being, where a person had the profit, without the propriety. (Wood's Inst. Civil Law. L. 2. c. 1.) This division, however, was opposed by *Cujacius* and some others. (Craig Jus. Feud. L. 1. Dieg. 9.)

[2] The Rule laid down in the text received a partial confirmation from the Stat. of Westm. the 2. c. 41. I say partial, on the authority of Lord Coke, who lays it down, that Bishops are not comprehended in that Act. (2 Inst. 457.) "William the "Conqueror thought proper to change the spiritual tenure of "frankalmoigne or free-alms, under which the Bishops held "their Lands during the Saxon Government, into the feudal or

CHAP. II.

But Heirs are bound, so far at least as the Donations of their Ancestors are reasonable, to warrant them, and the things comprised in them, to the persons to whom they are made, and to their Heirs.[1]

CHAP. III.

Of Heirs, some are nearest,[2] others more remote. A Man's nearest Heirs are those of his Body, as a Son, or a Daughter.[3] Upon the failure of these, the more remote Heirs are called, namely, the Grandson, or Grand-Daughter descending in a right line from the Son or Daughter, *in infinitum*. Then the Brother and Sister, and those descending from them in a trans-

" Norman Tenure by Barony, which subjected their Estates to " all civil charges and assessments, from which they were before " exempt." (2 Bl. Com. 156.)

[1] " For where *dedi*," says Lord Coke, " is accompanied with a " perdurable tenure of the feoffor and his Heirs, there *dedi* im- " porteth a perdurable warranty for the Feoffor and his Heirs to " the feoffee and his Heirs; and herewith agreeth Glanville : " (referring to the text) (3 Inst. 275.)

[2] *Plura*, says Fleta, *heredem reddunt hereditati propinquiorem ; utpote sexus, linea, hereditas partibilis, pluralitas fœminarum, modus donationis et sanguinis.* (L. 6. c. 1. s. 12.)

[3] Yet, Bracton reckons a daughter a more remote Heir when a Son was living. (Bracton 64. b.) It is clear, that author uses the term *comparatively*, and so the Grand Norm. Cust. uses it, (sparsim.)

verse line. After these, the Uncle,[1] as well on the part of the Father, as of the Mother, and in like manner the Aunt, and their Descendants.[2]

When, therefore, a Man possessed of an Inheritance dies, leaving one Son only his Heir, it is unquestionably true, that such son shall succeed entirely to his Father. If, however, he leaves more sons, then, a distinction must be made, whether the deceased was a Knight, or one holding by Military Tenure, or whether he was a Free Sockman.[3] Because, if he were a Knight, or holding by Military Tenure, then, according to the Law of the English Realm, his Eldest son shall succeed to the whole Inheritance, so that none of his Brothers can by right claim any part of it.[4] But, if the Parent

[1] *Avunculus.* Our Author is guilty of an inaccuracy in using this term, which means, an Uncle on the Mother's side, *patruus* being the Uncle on the Father's side.

[2] *V. Somneri Tractat. de Gavelkynd. pag.* 42, *et Bracton L.* 2. *c.* 34. *fol.* 76. *a. Fletam Lib.* 5. *c.* 9. *s.* 15. (Al. MS.) On the Rules of descent as they existed amongst the *Jews*, the *Grecians*, the *Romans*, the *Lombardi*, the *Normans*, the ancient *British*, the *Saxons*, *&c.* I refer the Reader to Lord Hale's admirable though unfinished Tract, the History of the Comm. Law, chapter 11th. On the Rules of descent, as existing in *this Country* when *Bracton* wrote, which Lord Hale informs us, stood settled in all points as they are at this day, except in some few matters soon after settled, the Reader may turn to the 2nd Book c. 30. 31. of Bracton.

[3] The Norman Code divides Inheritances into impartible and partible—the former appearing to answer to our military tenure, the latter to our soccage tenure. (Grand Custum. c. 24.)

[4] "The Normans, introducing their Feuds, settled the whole "Inheritance of them upon the Eldest son, which the ancient "feudal Law did not (as we before have noted) till feuds were "grown perpetual. The reason, as I take it, that begat this al-"teration was, for that while the feud did descend in Gavelkynd

were a free Sockman,[1] then, indeed, the Inheritance shall be equally divided amongst all the sons, however numerous, provided such Soccage Land has been anciently divisible,[2] reserving, however, to the Eldest son

" to the sons and nephews of the feudatory, the services were " suspended, till the Lord had chosen which of the sons he would " have for his Tenant, and then it was uncertain, whether the " party chosen would accept of the feud or not, for sometimes " there might be reasons to refuse it." (Spelm. Reliq. p. 43. See also 3 Litt. Hist. Hen. p. 122. and Robinson on Gavelkynd. 22.)

[1] *Vide Spelm. Reliq. in libello inscript. Feuds and Tenures by Knight's Service c. 27. p. 43. and 44.* (Al. MS.)

[2] Soccage Lands are asserted to have remained partible long after the Conquest, and, as we have no account of the precise period when the alteration was made in the descent of these Lands from all the Sons equally to the Eldest Son only, it is probable, as Mr. Robinson suggests, that the alteration was not effected at once nor by any written Law, but crept in insensibly and by degrees, in imitation of the Descents of Knight's Service, and from the pride of the Soccage Tenant, emulous that his Eldest Son should equal in state and splendor the military Tenant. " But this alteration began to appear more plainly in the time of " Henry the 2nd. for, according to *Glanville*, who wrote in that " Reign, in order to entitle the Sons to take equally, it was not " only necessary that the Land should be holden in free soccage, " but further *quod antiquitus divisum* "—and, having cited the present and following passages of our author, Mr. Robinson proceeds " So that according to this account, it is difficult to say, " what was then the common Law with regard to descents of " soccage Lands, or whether every person entitling himself to " them by Inheritance, was not obliged to set out the special " custom of the place. The same author, indeed, in other parts " of his Book, speaks of the partibility of these Lands more gen- " erally, and in such manner as may induce a belief, that it re- " mained the common Law at that time : *Plurium item hæredum* " *conjunctio mulierum scil. in feodo militari vel masculorum vel* " *fœminarum in libero socagio.* (L. 13. c. 11.) And, in another " very remarkable passage, wherein he shews, that the Law so " greatly respected this equal division among the Sons, as not to " permit the Father even in his lifetime to prefer a favorite child

as a mark of respect to his seniority,[1] the Capital Messuage, upon his making a Compensation to the others equal to the value.[2] If, however, the Estate was not anciently divisible, then, the Eldest son shall, according to some customs, take the whole Inheritance,

" to any of the rest, by advancing him beyond his proportionable " part "—referring to the first chapter of the present Book. (Robinson on Gavelkynd 24. 25.) The two latter positions referred to by Mr. Robinson, as laid down by Glanville, may be accounted for by supposing, that our author speaks with reference to Land " *antiquitus divisa*." " Although," says Lord Hale, commenting upon a passage in our author's text, " Custom directed the De- " scent variously, either to the Eldest or Youngest or to all the " Sons, yet, it seems, that at this time, *Commune Jus*, or Com- " mon right spoke for the Eldest Son to be Heir, no custom in- " tervening to the contrary." (Hist. Com. Law 226.) To conclude, the right of primogeniture every day making a greater progress had, as Mr. Robinson observes, in the Reign of King John fairly got the upper hand of the partible descent, the presumption then being that even Soccage Lands (unless in Kent) were descendible to the Eldest Son only, unless the contrary were proved. (26.) Upon the doctrine of the text and the subject of this note, see the authors referred to; also Bracton 76. a. Fleta L. 5. c. 9. s. 15. Mirror c. 1. s. 3. and Co. Litt. 14. a.

[1] *Æsneciæ*—Gall. *aisnè*, quasi *ains ne*. The transition is easy from the person of the Elder to his privilege or the right of Seniority. (Spelm. Gloss. ad voc.) The term occurs in the Statute of Marlbridge, Fleta, Bracton, Norman Custumary &c. Among the customs of Beauvoisis, we find a Law similar to that in our text. (c. 14.) But *Thaumas* observes, that this privilege attached to seniority did not regularly prevail unless *Sur les Heritages nobiles* (397.) It was clearly not so restrained with us.

[2] *Primum Patris feodum primogenitus filius habet.* (LL. Hen. 1. c. 70.) From this Lord Hale collects, that though the whole land did not descend to the Eldest Son, yet it began to look that way. (Hist. Com. Law, 224.) Mr. Somner, however, interprets the *primum feodum* to be only the Capital Messuage, according to *Glanville*, in the passage now before us, or what is called in the Grand Norman Custum. *le chief de Heritage* (Anglo-Sax. LL. Ed. Wilkins p. 266.)

whilst, according to other Customs, the younger son shall succeed as Heir.[1] In like manner, should any person leave one Daughter only, his Heir, then what we have laid down with respect to a son shall unquestionably prevail. If, however, he leave more Daughters, then, the Inheritance shall, without distinction, be divided between them, whether their Father was a Knight or a Sockman, reserving to the Eldest Daughter, the Capital Messuage, under the conditions before mentioned. But it should be observed, if either of the Brothers or Sisters, amongst whom the Inheritance is divided, should die, without leaving any Heir of his or her Body, then the portion of the person so dying shall be divided amongst the survivors. But the Husband of the Eldest Daughter shall do Homage[2] to the Chief Lord for the whole Fee. But the Younger Daughters, or their Husbands, are bound to perform to the Chief Lord the services due for their Land, by the hand of the Eldest Daughter, or her Husband. Yet the Hus-

[1] See Lord Hale's Comment on this passage, supra note 2. p. 126.

[2] Our author professedly resumes the subject of Homage in the 9th Book. We shall, therefore, in this place merely notice that Craig makes the military feud to consist in three things—*Homagium*, *fidelitas*, and *scutagium*. The chief distinctions between the two former *as stated by that author*, are, 1st, The manner of performing Homage was much more humble and impressive, than that of performing Fealty. 2nd, Homage was due for a military Fee alone; a Rule that if it ever prevailed was relaxed by the English Law. 3rd, Homage could only be received by the Lord personally, fealty might be received by a Bailiff. 4th, Those who held by Homage were bound to sell or pledge every thing for their Lord; but the tenant by simple fealty had no such heavy obligation imposed upon him. (Craig. Jus Feud. L. 1. D. 11. 10).

bands of the Younger Daughters are not bound to perform any Homage, or even Fealty, to the Husband of the Eldest Daughter, in her lifetime.

Nor are their Heirs in the first and second degrees; but those in the third descent from the Younger Daughters are bound by the Law of the Realm, to do Homage for their Tenement to the Heir of the Eldest Daughter, and to pay a reasonable Relief.[1] In addition it should be known, that Husbands cannot give any part of the Inheritance of their Wives, without the consent of their Heirs, nor can they remit any part of the right of the Heirs, unless in her lifetime.[2] If, however, a Man leaves a son and Heir, and has besides one Daughter or more, the son succeeds entirely to the Inheritance—from whence it follows, that if a Man should have married many Wives,[3] and by each of them have had one or more Daughters, and at length an only son by the last of them, the son alone shall obtain the Inheritance of the Father; because, it is a general Rule, that a Female can never share an Inheritance with a Male, unless perhaps a special Exception to this exist in some particular City, grounded upon a

[1] Among the customs of Beauvoisis, there is a Law very similar from which Thaumas asserts we borrowed our rule. (c. 47.) The doctrine of the text is confirmed by Henry the 2nd's Charter to the Irish, which the Reader will find among Thaumas's notes to the customs of Beauvoisis p. 396.

[2] Nor yet remit nor diminish the right of the Heir, but only "during their (the wives) lifetime." (Reg. Maj. L. 2. c. 29.)

[3] Vide D. Craig. Librum de Successions Anglicè versa p. 375. (Al. MS.)

Custom which has long prevailed there. But, if a man should marry different Women, and by each of them should have one Daughter, or more, all the Daughters are equally entitled to the Inheritance of the Father, in the same manner as if they were all sprung from the same Mother.[1] But when a Man dies without leaving any Son, or Daughter, his Heir, if he has any Grand Children, then, undoubtedly, they shall succeed to him, in the same manner as we have above mentioned, his Son or Daughter would have succeeded, and under similar distinctions. For the Descendants in the right line, are always to be preferred to those who are in the tranverse line. But when any one dies, leaving a younger son, and a Grandson, the Child of his Eldest son, great doubt exists, as to which of the two the Law prefers in the succession to the other, whether the Son or the Grandson. Some think, the Younger Son has more right to the Inheritance than such Grandson, for this reason—that the Eldest Son did not survive his Father, and was not in existence when the Inheritance fell, but the Younger Son did out-live both his Brother and his Father, and it is, therefore, right, as they contend, that he should succeed to his Father. But others incline to think, that the Grandson ought of right to be preferred to his Uncle.

For since the Grandson descended from the Eldest

[1] "This is to be understood," says the Regiam Majestatem, "of the Father's Heritage, descending from him to them. For, "if the Heritage descend and come of the Mother's side, each "daughter shall succeed to the Heritage of her own Mother." (L. 2. c. 31.)

Son and is the Heir of his Body, he would have succeeded to all his Father's rights had he still lived, and he ought therefore to succeed. In which opinion I concur, if his Father was not portioned off[1] by the Grandfather.

For a Son may, in the lifetime of his Father, be portioned off by him, if the father assigns a certain part of his Land to the Son, and deliver him Seisin in his lifetime, at the request and with the unrestrained consent of the Son, in such manner, that the latter be fully satisfied with such part. In such case, the Heirs of the Son's Body, cannot claim, as against their Uncle, or any other person, any greater portion of the residue of the Grandfather's Inheritance, than the part of their Father, although the Father himself might, if he had survived the Grandfather. Besides, if the Eldest Son, after having in his Father's lifetime done Homage to the Chief Lord for his paternal Inheritance, should die before his Father, there is no question but that his Son shall be preferred to the Uncle. Upon this subject, however, a contest may arise, between the Grandson and the Chief Lord, if the latter refuse the Homage of the Grandson; or between the Chief Lord and the Uncle, if the Chief Lord has warranted the Homage of the Grandson. In both these cases, there is no reasonable objection to prevent the matter coming to the Duel, unless the Homage can be proved; for then,

[1] *Forisfamiliatus* is *aliquem foris familiam ponere*, says Spelman, (Gloss. ad voc.)—a similar explanation to that of the Regiam Majestatem. (L. 2. c. 33.)—Vide also 2 Bl. Com. 219.

indeed, (as the Law now obtains between the Uncle and the Grandson) *Melior est conditio possidentis.*[1]

CHAP. IV.

Upon a failure of Descendants in the right line,[2] then the Brother or Brothers succeed; or, if no Brothers can be found, the Sisters are to be called; and, these being dead, their children are to be called. After these, the Uncles are to be called, and their children; and, lastly, recourse must be had to the Aunts, or their children; the distinction above-mentioned being always observed and kept in view, between the sons of a

[1] "If it cannot be proved, that the Homage was made between "the Nephew and the Father's Brother, he shall be preferred "who is in possession. For the condition of the possessor is "best." (Reg. Maj. L. 2. c. 33.)

[2] *Si quis*, says a Law of Henry the first, *sine liberis decesserit, Pater aut Mater ejus in hereditatem succedant, vel frater, vel soror, si pater et mater desint.* (LL. Hen. 1. c. 70. Ed. Wilkins.)

Patri, says the Norman Code, *succedit filius primogenitus: et matri similiter. Et si prior patre decesserit ejus filius, et ejus heres propinquior in eadem directa linea successionis hanc successionem obtinebit. Si vero nullus de linea primogeniti remanserit, filius post primum primogenitus, ut ejusdem lineæ propinquior decesserit, successionem hereditariam retinebit. Et similiter intelligendum est in aliis lineis postnatorum. Si vero omnes lineæ eorum decesserint, ad fratrem primogenitum redit successio feodalis, vel ad ejus lineæ propinquiorem. Si autem fratres defuerint, ex eorum linea redit ad patrem ex quo lineæ processerint.* (Le Grand Cust. de Norm. c. 25.) I conclude this note with the modern French Canon—"The Law regulates the order "of succession among lawful Heirs: for want of them, the prop-"erty passes to the natural children, after that to the surviving "Husband or Wife; and, for want of these, then, to the state." (Code Napoleon, s. 720.)

Knight, and of a Sockman, and in like manner, between their Grand-children. The distinction between Males and Females is likewise to be observed.

CHAP. V.

Heirs are also bound to observe the Testaments of their Fathers, and of their other Ancestors. Of such, I mean, to whom they are Heirs; and to discharge their Debts. For every Freeman, not involved in Debt beyond his circumstances, may on his death-bed make a reasonable division[1] of his Effects, under this form, as prescribed by the custom of certain places. In the first place, he should remember his Lord, by the Gift of the best and chief thing he possesses: then the[2] Church, and afterwards other persons at his pleasure. But, whatever the Custom of different places inculcate with reference to this point, yet, according to the Law of the Realm, no man is bound to leave any thing by Will to any person in particular, unless it be his inclination; for every Man's last Will is said to be free, according to the spirit of these Laws, as well as others.

[1] *Divisam*, derived, according to Spelman, from the French term *diviser*, to partition or divide. (Spelm. Gloss.) It is sometimes used for a boundary of Land—*metæ et rationabiles divisæ quæ ponuntur in terminis et finibus agrorum ad distinguendam prædia*, says Fleta, L. 4. c. 2. s. 17. In this latter sense our author uses it. Infra, L. 9. c. 13. 14. &c.

[2] *His*, according to the Harl. Bodl. and Cotton. MSS., designating, probably, his parish church, and not leaving him at liberty to chuse, what church he pleased.

A woman, indeed, when at her own disposal, may make a Testament; but, if married, she cannot, without the Authority of her Husband, make any Will of the Effects of her Husband.[1] Yet it would be a mark of affection and highly creditable to the Husband, if he concede a reasonable portion of his Effects to his Wife; in other words, a third part, which, indeed, she would be entitled to, should she out-live him, as will be more fully seen hereafter. Husbands indeed, much to their honor, frequently grant to their Wives this indulgence.

When, therefore, any one being indisposed wishes to make his Will, if he be not involved in Debt, all his moveables should be divided into three equal parts; of which one belongs to his Heir,[2] another to his Wife, and the third is reserved to himself.[3] Of this third, he

[1] The modern French Code permits the wife to make *a will*, even without the authority of her Husband. (Code Napoleon, s. 226.)

At the same time she is restrained from making *a gift*, without his consent, or the sanction of the Law. (Ibid. s. 905.)

[2] "To his children" generally, according to the Reg. Maj. c. 36. With respect, however, to the text of Glanville, Mr. Selden collects, from the Laws of Henry the first and the Assise of Clarendon, that the *Heirs* inherited Chattels as well as Lands, as late as the time of Henry the second, and that the Law was changed about the time of King John, by some Act of Parliament not now to be found. (Selden's Tit. of Honor, part 2. c. 5. s. 21.)

[3] The text receives considerable confirmation from the customs of Gavelkynd, highly probable as it is, that those customs are the valuable relics of the old common Law. "Let the goods of "gavelkynd Persons," says the *Custumal af Kent*, "be parted "into three parts, after the funerals and the debts paid, if there "be lawful Issue in life. So that the dead have one part, and "his lawful sons and daughters another part, and the wife the

has the free power of disposing. But, if he dies without leaving any Wife, the half is reserved to him.[1]

"third part: and, if there be no lawful issue in life, let the dead "have the one half, and the wife alive the other half." (vide Robins. on Gavelkynd, 287.) Lord Hale recognises the doctrine in the text, which, he tells us, was conformable to the ancient Law of England and the custom of the North to this day. (Hist. Com. Law. 192. 225.) It is likewise confirmed by the Regiam Majestatem, (L. 2. c. 37) and in substance by Bracton, and Fleta. —Yet, notwithstanding all this, Lord Coke, in his Commentary on Magna Carta, roundly asserts, that the doctrine laid down in the text, never was the Common Law; (2 Inst. 82) and, in support of this position, he cites a passage from Bracton.

To that passage, I have turned. Bracton there confirms the text of Glanville, and tells us, that the Law is so, unless in some cities and boroughs.—This leads him to mention the custom of London, and some floating opinions about its extent. He is of opinion, that the will of a citizen of London ought to be free, and unrestrained by any such limitation, as was imposed upon wills by the common Law. But Lord Coke has hastily assumed, that what Bracton spoke *of the custom of London only*, related to the kingdom at large. As this assumption fails, the deduction that flowed from it fails also. Sir William Blackstone, I find, has mentioned and refuted Lord Coke's mistake. (2 Comm. 492) as has Mr. Somner in his Treatise on Gavelkynd, p. 96. To these authors, the reader may refer, as also to Reeves's Hist. Eng. Law. 2. 334. 335. and F. N. B. 270. In concluding this note, I shall mention, the course of distribution of an Intestate's Effects under the Laws of Canute, and the conqueror. Under the *former*, the Lord took the Heriot, and the remainder was distributed between the wife, children, and relatives, *cuilibet pro dignitate quæ ad cum pertinet.* (LL. Canuti, 68.) Under the *latter*, the children divided the Inheritance equally between them. (LL. Gul. Conq. 36.)

[1] Bracton and Fleta perfectly concur with our author, except that they use the word *children* instead of Heir, adding, that if the deceased had no children, then, the one half was at his own disposal, the other belongs to the wife; and, if he had neither wife nor child, the whole was at his own disposal. (Bracton, 60. b. Fleta, L. 2. c. 57. s. 10.) Before we quit the present chapter, it may not be amiss to observe, that Glanville has been thought grossly to contradict himself in the course of it. But

But of his Inheritance, he cannot by his last Will make any disposition, as before observed.

CHAP. VI.

THE Testament ought to be made in the presence of two or more lawful Men, either clergy or lay, and such as can be proper witnesses of it. The Executors of a Testament should be such persons, as the Testator has chosen for that purpose, and to whom he has committed the charge.

But, if he should not nominate any person for this

this has been inconsiderately imputed to him by those, who have not attended to the context. He states, that according to certain customs, which prevailed in particular places, a man was bound to remember his Lord, and the Church, previously to his making his will. But, says he, whatever those customs inculcate, yet, according to the Law of the realm, no man is bound to leave any thing *to any particular person*, unless it be his inclination, for every man's will is free, *over that part of his property which the Law permits him to dispose of, namely, a third, or, eventually, a half*—When our author laid it down, that a man's will was to be free, he did not mean to assert, that he was at liberty to dispose of *all* his property. Should it in the present day be laid down, that a Testator's will was free, and that he was not bound to give any thing to any particular individual, would it be a fair inference, that a man could devise his *entailed* Lands? If we apply this to Glanville, he is consistent, and will be understood to speak, with reference to persons, what he has been considered to speak, with respect to things. That the division of the property, mentioned in the text, did not long survive the time of Glanville, is most probable. (See Somner on Gavelk. p. 98.) Swinburne seems strangely to have blundered in thinking, that our author took part of his text from Magna Carta, (Swinburne on Wills, part 3. section 16.) The passing of which was an event clearly *posterior* in time to Glanville.

purpose, the nearest of Kin and Relatives of the deceased may take upon them the charge; and this, so effectually, that should they find the Heir or any other person detaining the Effects of the deceased, they shall have the King's Writ directed to the Sheriff in these words——

CHAP. VII.

"The King to the Sheriff, Health.[1] I command "you that, justly and without delay, you cause to "stand the reasonable division of *N.* as it can be rea- "sonably shewn that he made it, and that it ought to "stand. Witness, &c."

CHAP. VIII.

When a party, summoned by authority of this Writ, alleges any thing against the Testament itself; either that it was not reasonably made, or that the thing claimed was not as asserted left by it, then, the Plea ought to be heard and determined in the Court Christian; because Pleas concerning Testaments ought to be agitated before the Ecclesiastical Judge, and decided according to the course of Law, on the Testimony of those who were present at the time of the making of the Will. But if the person, who intends to make a will, should be overburthened with Debts, he cannot

[1] Vide F. N. B. 270.

(beyond the payment of his Debts) make any disposition of his Effects, without the consent of his Heir.

Should it, however, happen, after payment of the Debts, that any thing remains, then it is divided into three parts in the manner before stated; and he may, as observed, make a Testament of a third part of it. If, however, the Effects of the deceased are insufficient to pay his Debts, then his Heir is bound to make up the deficiency out of his own; I mean, if he is of Age.[1]

CHAP. IX.[2]

This leads us to observe, that some Heirs are evidently of Age, some as clearly not of full age, but others of whom it may be doubtful, whether they have attained their age or not. The first description of Heirs may, immediately upon the deaths of their Ancestors, hold themselves in possession of their Inheritance,[3] although their Lords may take the Fee, together with the Heir, into their hands. This, how-

[1] "If the goods of the defunct are not sufficient for payment of "his Debts, by the Law, his Heir should pay the same of his "own proper goods." (Reg. Maj. L. 2. c. 39.) This Rule was soon altered. *Quatenus*, says Bracton, *ad ipsum pervenerit, scilicet, de hereditate defuncti et non ultra, nisi velit de gratia, et si nihil multo fortius.* (See Bracton, 61. a. Fleta, L. 2. c. 57. s. 10.) *Notandum est, quod nullus de antecessoris debito tenetur respondere ultra valorem quod de ejus hereditate dignoscitur possidere.* (Le Grand Cust. de Norm. c. 88.)

[2] Hereon generally, see Bracton, 86. b.

[3] Vide Statute of Marlebridge, chap. 16. and Lord Coke's Comment thereon. (2 Inst. 133.)

ever, ought to be done with such moderation, as not to cause any Disseisin to the Heirs, who may, indeed, should it be necessary, resist the violence of their Lords, provided they are prepared to pay their Reliefs, and to render to them such other services as are justly due. But, if it be evident that the Heir is under age, and he hold by Military service, he is considered to be in the Custody[1] of his Lord, until he attains his full age.

The full age of an Heir, if the son of a Knight, or of one holding by Military service, is when he has completed his twenty-first Year.[2] But, if the Heir be the Son of a Sockman, he is esteemed to be of full age when he has completed his fifteenth Year.[3] If he is the son of a Burgess, he is understood to have attained his full age,[4] when he has discretion to count Money and measure Cloth, and in like manner to manage his Father's other concerns.

In so extensive a sense have Lords the Custody of the Sons and Heirs of their Homagers and of their Fee, that they, for example, exercise an absolute con-

[1] Of the Custody and Marriage of the Minor, we may form a general notion, when we understand, that they were considered as chattels and moveables, which the Lord might dispose of *in extremis*. See Fleta and Bracton, Sparsim.

[2] Vide Craig. Jus feud. L. 2. D. 17. s. 17. and L. 2. D. 20. s. 17. —Bracton 86. b.

[3] Vide Craig. Jus feud. L. 2. D. 17. s. 37.—LL. Hen. 1. c. 70.— Bracton 86. b. This, it seems, is still the age by the custom of Gavelkynd. (Robins. on Gavelk. 185.)

[4] At fourteen, or when he can attend to his Parent's concerns, according to Reg. Maj. L. 2. c. 41. See Bracton 86. b.

troul with respect to presenting to Churches in their Custody, in marrying Females, (if they fall into wardship), and in regulating other matters, in the same manner as if they were their own. The Law, however, does not permit the Lords to make any absolute disposition of the Inheritance. In the mean time, the Lord should maintain the Heir in a manner suitable to his Dignity and the extent of his Inheritance, and should discharge the Debts of the deceased, so far as the Estate and the length of the Custody will admit.[1] Hence they are bound by the Law to answer the Debts of the Ancestors.

The Lords may also manage the concerns of the Heir, and commence and prosecute all Suits for the recovery of his rights, provided no exception be taken on account of the Minor's Age.[2] But the Lord is not bound to answer for the Heir, neither in a question of Right nor of Disseisin, except in one instance—when one Minor has the Custody of another, after the decease of his Father. Should the latter Minor, upon his attaining his full age, be refused his Inheritance, he may have an Assise and Recognition of the Death of his Ancestor; nor shall the Recognition, in such case,

[1] The doctrine of the text is corroborated by the Reg. Maj. L. 2. c. 42. "Every Guardian," says the Mirror, "is answerable "for three things. 1. That he maintain the Infant sufficiently. "2. That he maintain his rights and Inheritance, without waste. "3. That he answer and give satisfaction of the Trespasses done "by the Infant." (Mirror c. 5. s. 1. See also Bracton 87. a. and le Grand Cust. de Norm. c. 33.)

[2] The Translator renders the passage as restored by the Harl. Cotton. and Dr. Milles's MSS.

cease, on Account of the Minority of the Lord. But if a Minor be appealed of any Felony,[1] then he shall be attached by safe and secure pledges. Yet, whilst he continues within age, he shall not be compelled to answer, nor until he has attained his full age. Those persons who have the Custody are bound to restore the Inheritance to the Heirs in good condition,[2] and discharged from Debts, in proportion to the duration of the Custody, and the extent of the Inheritance. But if it be doubtful, whether the Heir be of full age or a Minor, then, undoubtedly, the Lord shall have the Custody as well of the Heir as of his Inheritance, until the full age of the Heir be reasonably proved by the oaths of lawful men of the Vicinage.

CHAP. X.

If those Heirs, liable to be in Custody, have more Lords than one, the chief Lord, that is, the one to whom the Heir owes allegiance for his first Fee, shall have the Custody. But this is not to deprive the Lords of the other Fees of their Reliefs and rightful

[1] *Appeletur de Felonia.* "*Appellum*," says Sir Edward Coke, "signifies an accusation, and, therefore, to appeal a man is as "much as to accuse him." The word *appellum* is derived of *appeller* to call: because, *appellans vocat reum in judicium*, he calleth the Defendant to judgment. (Co. Litt. 287. b. See also 391. a. and Cowell ad voc.) Appeals were known to the Normans. (Grand Custum. c. 68.)

[2] This, though a part of the common Law, had been so frequently violated, that it was felt necessary to make it part of the Great Charter. (2 Inst. 14.)

services; but the Custody shall remain to them entire, under the form before mentioned. Yet should it be observed, that when any one hold of the King *in Capite*, the Custody of him belongs exclusively to the King, whether the Heir has any other Lords or not; because the King[1] can have no equal, much less a superior.[2] But yet, by reason of Burgage Tenure,[3] the King is not preferred in the Custody to others. If the King should commit the Custody to another,[4] then, a distinction is to be made, whether it is unconditionally, and in such manner as not to render the person to whom it was committed accountable to the Exchequer, or whether it is under restrictions. If it is committed to him in such unconditional manner, then he can present to vacant Churches, and, generally, as far as consistent with Justice, manage the concerns of the Heir, as if they were his own.

CHAP. XI.

The Heirs of Sock-men upon the death of their Ancestors, shall be in the Custody[5] of their nearest

[1] Bracton L. 1. c. 8. (Al. MS.) [2] Bracton fo. 5. b.

[3] Or soccage, says Bracton, fo. 87. a. See Co. Litt. 77. a.

[4] Vide 2. Inst. 12. 13. With respect to the Practice, alluded to in the text, Lord Littleton observes, that undoubtedly inferior Lords did the same. It likewise, adds his Lordship, appears by the Great Rolls, that the wardships of the crown were sold by King Henry the second, and mention is made of that practice, without any blame, in the charters of King John and Henry the third. (Hist. Hen. 2. Vol. 3. 109.) The above citation from Lord Coke confirms the doctrine of the noble Historian.

[5] If, says a Law of Ina, the Husband and Wife have any

Kindred, with this distinction, that if the Inheritance itself descended from the paternal side, the Custody shall be conferred upon the kindred, the descendants on the maternal side; but, if the Inheritance descend on the part of the Mother, then the Custody belongs to the Kindred on the Father's side. For the custody of a person shall never by Law be committed to another, of whom a suspicion can be entertained, that he either could or might wish to claim any right in the Inheritance itself.[1]

CHAP. XII.

But if the Heirs are females, they shall remain in the Custody of their Lords. If they are Minors, they

children, and the Husband dies, the mother shall retain and nourish her Child. Six shillings shall be given her to enable her to do it; a Cow, in summer, and an Ox, in winter. (LL. Inæ c. 38.)

[1] *Nullus Heredipeta sui propinqui, vel extranei periculosæ sane custodiæ committatur.* (LL. Hen. 1. c. 70.) Lord Chancellor Macclesfield condemned this Rule, as not grounded upon reason, but as prevailing in barbarous times, before the Nation was civilized.—(2 P. Wms. 262.) On the other hand, Fortescue, (c. 44.) Lord Coke, (Co. Litt. 88. b.) Judge Blackstone, (1 Comm. 461.) Mr. Hargrave, (note to above), and Mr. Christian (ubi supra) approve of this Rule of our Law, so opposite to that prevailing in the Roman Code. Nor has the Great Feudist Craig withheld the testimony of his approbation to it.—(Craig Jus. feud. L. 2. D. 20. s. 6.) Dr. Sullivan, however, approves both of our Rule and the civil law Rule, conceiving each adapted to the peculiar state of the people—the one, a barbarous—the other, a civilized people,—(Lect. on Laws of England p. 127.) but this of course is applicable to the origin rather than the continuance of the Rules.

It was in conformity to the rule laid down in the text, that the Eldest Sister was excluded from having the custody of her Younger Sisters. (Bracton fo. 78. a. Fleta, L. 3. c. 16. s. 71.)

shall continue in Custody until they are of full age,[1] at which period the Lord is bound to find them a Marriage, delivering to each of them her reasonable portion. But if they were of full age, then also they shall remain in the Custody of their Lord, until with his Advice and disposal they are married; because without the disposal or assent of her Lord no female, the Heir to Land,[2] can by the Law and Custom of the Realm be married.

Hence it is, that if a Man, having only a Daughter or Daughters, his Heirs, should in his lifetime marry off one or more of them without the assent of the Lord, he is justly, according to the Law and Custom of the Realm, for ever deprived of his Inheritance; and that in such manner, that he can never afterwards recover any part of it, unless by the indulgence of the Lord. The reason is simply this—that as the Husband of an Heiress is bound to do Homage to the Lord for her Estate, the approbation and consent of the Lord is requisite for such purpose; least he should be compelled to receive from his Enemy, or from some other improper person, the Homage due in respect of his Fee.[3] But if any one demands of his Lord a License

[1] We are informed by the Regiam Maj. that they were of full age at fourteen complete. (L. 2. c. 48.) At which time, they might, it was supposed, have Husbands, capable of performing the services due for their Fiefs. See Bracton 86. b.

[2] "By *Land* in this passage, he means, Land that was held by "military service." (3 Litt. Hist. Hen. 2. 103.) If we may judge from a law of *Canute*, (LL. Canuti 72.) the marriage of Wards was unknown in his time.—Vide Spelm. Reliq. p. 29.

[3] "This," observes Lord Littleton, "appears to extend equally

to marry his Daughter and Heir to another, the Lord is bound either to consent, or to shew some just cause, why he refuses;[1] otherwise the woman may, with the advice and approbation of her Father, be married, even contrary to the Lord's inclination. Upon this occasion it may be asked, if a Woman, having Lands in Dower, may, without the consent of her Warrantor,[2] follow her own inclination in marrying another; and, if she do so, whether she shall on that account lose her whole Dower? It does not appear that she ought for that reason to lose her Dower, since her Husband, by the Law and Custom of the Realm, owes no Homage to her Warrantor, but merely Fealty with an Oath, least if the Woman herself should die before her Husband, the Homage should be entirely lost, no Tenure being retained. Yet the Woman is bound to obtain the consent

" to all kinds of fiefs for which Homage was done, as to those " that were held by Knight's Service." (3. Hist. Hen. 2. 104. Vide also Craig Jus feud. L. 2. Dieg. 21. s. 8. Bracton 88. a.)

[1] Henry the 1st expressly promises, in his Charter, that he will take nothing for his consent, nor will he withhold it, unless it be proposed to unite the female to his enemy. (Anglo-Sax. LL. Ed. Wilkins p. 233.) He promises, also, on the death of his Barons, to marry their Daughters with the advice of the other Barons, and that he will not compel widows to marry again; and he enjoins his Barons, to act in a similar manner towards their Tenants. These regulations were but ill observed. From the text, it is perfectly clear, that the right of marriage extended to females only: but Lords subsequently enlarged their claim, and exercised it also over Male Heirs. This is supposed to have grown up in Henry the 3d's time from a forced construction of those words of Mag. Car. *Heredes maritentur sine disparagatione.* (Sullivan's Lectures, p. 130.)

[2] The Heir of her Husband, who must, therefore, have frequently been not only her own Son, but an Infant. This may be considered as one of the absurdities of the Feudal system.

of her Warrantor to her marriage, or she shall lose her Dower,[1] unless, indeed, she holds other Land in Marriage-hood or by Inheritance; for then it suffices, if she has obtained the consent of the Chief Lord. This Rule obtains not on account of the Homage but of the other Fealty, which the Husband is bound to perform to the Lord as we have observed. But, if the Inheritance be within the Fees of many different Lords, it is then sufficient, if the consent of the Chief Lord be obtained to the Marriage of the female Heir. If female Heirs, during such time as they are in Custody, are guilty of incontinence,[2] and this be proved, then, those who have thus erred shall be excluded from the Inheritance; and their portion shall accrue to the others, who are free from the same stain. But if, in this manner, all of them should err, then, the whole Inheritance shall devolve

[1] Under the Assises of Jerusalem, the Widow, generally speaking, was not to be compelled to marry again; but if she did, she was to ask the consent of her Lord. (c. 187.) See also the Mirror c. 1. s. 3. and Bracton 88 a.

[2] *De corporibus suis forisfecerunt. Forisfacio* is, according to Spelman, derived from the French *forfaire.* (Gloss. ad voc.) In a proper signification, therefore, and as indicating *forfeiture*, it rather describes the punishment than the offence. The transition is by no means difficult; and, in its application to the crime, it assumes a new meaning, by a gradation in language not unfrequent. The term frequently occurs in the translations of the Saxon and Norman Laws. (Vide LL. Ed. Conf. c. 32. 10. 36. 12. and Gul. 1. c. 1. Hen. 1. c. 23. Vide also Craig L. 3. D. 3. s. 2. Co. Litt. 58. a. and 2 Inst. 227.) Lord Littleton observes, "this was a severe punishment for the frailty of a single woman, "and without example in other Laws: but it undoubtedly arose, "not so much from a rigorous sense of the heinousness of the "fault, as from the notion of an advantage due to the Lord "from the marriage of his ward, which he probably might be "deprived of by her being dishonored." (3 Hist. Hen. 2. p. 119.)

upon the Lord, as an Escheat. Yet, if such female Heirs are once lawfully married, and afterwards become widows, they shall not again be under the Custody of their Lords; although they are, for the reason formerly explained, bound to ask his consent to their marriage.[1] Nor, in such case, shall they forfeit their Inheritance, if guilty of incontinence.[2]

But the assertion which is generally made, that incontinence[3] is no forfeiture of the Inheritance, is to be understood of the crime of the Mother; because, that Son is the lawful Heir, whom marriage proves to be such.[4]

CHAP. XIII.

NEITHER a Bastard,[5] nor any other person not born in lawful wedlock, can be, in the legal sense of the

[1] Vide Mag. Car. Cap. 7, and Lord Coke's comment thereon. (2 Inst. 16.) See also Robinson on Gavelk. 160 and Bracton 313. a.

[2] Lord Littleton thinks, the reason for exempting Widows from the penalty was, that they, not being under the custody of their Lords, their incontinence was no breach of the Duty and reverence due from a Vassal. (3. Hist. Hen. 2. p. 119.) The Mirror coincides with the text. (c. 1. s. 3.) The custom of Gavelkynd is less liberal to the frailty of the widow. (Robins. on Gavelkynd (195.)

[3] *Putagium*; quasi, says Spelman, *puttam agere* a Gall. *putte*, Ital. *putta*, meretrix. Petrarch. PUTTA SFACCIATA. (Spelm. Gloss. ad voc.)

[4] For the Common Law, says the Mirror, only taketh him to be a Son, whom the marriage proveth to be so. (Mirror p. 70. See also Bracton 63. a. b.)

[5] The Norman Code enumerates four Impediments to Succes-

term, an Heir.[1] But if any one claims an Inheritance in the character of Heir, and the other party object to him, that he cannot be Heir, because he was not born in lawful wedlock, then, indeed, the Plea shall cease in the King's Court, and the Arch-Bishop or Bishop of the place shall be commanded, to inquire concerning such marriage, and to make known his decision, either to the King or his Justices.

For this purpose, the following Writ shall Issue:—

CHAP. XIV.

"The King to the Arch-Bishop, Health. *W.* appear-
"ing before me in my Court has demanded against *R.*
"his Brother, the fourth part of one Knight's Fee, in
"such a Vill, as his right, and in which the said *R.*
"has no right, as *W.* says, because he is a Bastard
"born before the Marriage of their Mother. And,
"since it does not belong to my Court to inquire con-
"cerning Bastardy, I send them unto you command-
"ing, that you do in the Court Christian that which
"belongs to you. And when the Suit is brought to
"its proper end before you, inform me by your Letter

sion.—Bastardy, profession of Religion, forfeiture, and incurable Leprosy. (Le Grand Custum. de Norm. 27.) Bastardy seems to have been a legal objection to a witness under the Assises of Jerusalem. (56.)

[1] A different Law prevailed amongst the ancient Welch people, as Lord Hale deduces, from considering the *Statutum Walliæ* 12. Ed. 1. and, he thinks, that the Ancient British admitted Bastards to inherit. (1. Hist. Com. Law 219.)

" what has been done before you concerning it. Wit-
" ness, &c."

CHAP. XV.

Upon this subject it has been made a question whether if any one was begotten or born before his Father married the Mother, such Son is the lawful Heir, if the Father afterwards married his Mother? Although, indeed, the Canons and the Roman Laws consider such Son as the lawful Heir,[1] yet, according to the Law and Custom of this Realm, he shall in no measure be supported as Heir in his claim upon the Inheritance; nor can he demand the Inheritance, by the Law of the Realm.[2] But yet if a question should

[1] "In the time of Pope Alexander the 3rd, (A.D. 1160—Anno " 6. Hen. 2.) this Constitution was made, that children born be-
" fore solemnization of Matrimony where Matrimony followed,
" should be as legitimate to inherit unto their ancestors, as
" those that were born after Matrimony." (2 Inst. 96.) To this Constitution our Author alludes. The doctrine of the Norman Code is in conformity with the Canon of Alexander. (Grand Custum. c. 27.) The modern French Code allows, under certain restrictions, of the subsequent legitimation of children—even of deceased children, who have left issue. (Code Napoleon s. 331. 332.)

[2] "This decision of Glanville," observes Lord Littleton, "is
" very remarkable: as it shews the entire independence of the
" Law of England on the Canon and Civil Laws in his time."
(3 Litt. Hist. Hen. 2. p. 125.) When this doctrine was, in a subsequent period of our History, attempted to be overturned, it gave rise to the celebrated answer of the Barons recorded in our Statute Book.—*Et omnes Comites et Barones unâ voce responderunt, quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ.* (Stat. of Merton. c. 9. See also 2 Inst. 96.) The Rule, thus memorably defended, has descended untouched to the present day.

arise, whether such a Son was begotten or born before marriage, or after, it should, as we have observed, be discussed before the Ecclesiastical Judge; and of his decision he shall inform the King, or his Justices. And thus, according to the Judgment of the Court Christian concerning the marriage, namely, whether the Demandant was born or begotten before marriage contracted, or after, the King's Court shall supply that which is necessary, in adjudging or refusing the Inheritance respecting which the dispute is; so that by its decision the Demandant shall either obtain such inheritance, or lose his claim.

CHAP. XVI.

As a Bastard can have no Heir, unless it be one of his own Body, a question arises respecting a Bastard. If any one has given Land to him, reserving a service or any other thing, and has received his Homage for it, so that the Bastard has died in the Seisin of such Land, without leaving any Heir of his own Body, who is entitled by law to succeed to him, as his Lord cannot for the reasons before stated?[1] But when any one dies

[1] "It is answered," says the Regiam Majestatem, "that no "Man may succeed to him, but only the King by the reason "aforesaid." (L. 2. c. 52.) But Bracton resolves the question by informing us, that in such a case, the Land would escheat to the Lord; nor, would the circumstance of Homage having been received, alter the case, *quia homagium evanescit heredibus deficientibus ubique;* (Bracton. 20. b.) a doctrine which has been strangely misinterpreted, and that by a highly respectable writer, who considers the position laid down by Glanville, that

intestate, all his chattels are understood to belong to his Lord; and, if he has more Lords than one, each of them shall recover such Chattels, as may be found within his Fee. But all the Effects of a Usurer (whether he make a Will or not) belong to the King.[1] But it is not the Custom for any one, whilst living, to be appealed or convicted of the crime of Usury—but, among other Regal Inquisitions, it is usually inquired[2]

the Lord was precluded by receiving Homage of his claim to the Escheat, as not to be relied upon; because, *in the very next Reign*, the Lord was *ultimus heres* to a Bastard. In support of this conjecture, the Author in question appeals to Bracton. (Ubi supra.) See Dalrymple on Feuds p. 64. Bracton wrote the Law of the times as it stood when he composed his treatise, which was not *in the very next Reign*, but towards the latter end of the Reign of Henry the third, the better part of a century later than when Glanville wrote. Had the fact, however, been as assumed, the conclusion drawn from it would by no means be warranted: since, to argue from what is Law at one period in order to refute what was so at another *anterior* period is the purest sophistry.

[1] The Ancient *Romans* punished Usury with more severity, than they did Theft. (Cato de re Rustică Proem.) The *Norman* code imposes a forfeiture of all the offender's property, provided he had been guilty of Usury, within a year and a day before his death. (Grand Custum. de Norm. c. 20.)

By a Law of Edward the Confessor, Usurers were banished the kingdom, and a person convicted of the crime forfeited all his substance, and was to be treated as an outlaw. If the Reader feel any desire to penetrate into the motives that dictated this Law, these are the concluding words of it. *Hoc autem asserebat ipse Rex se audiisse in Curia Regis Francorum, dum ibidem moraretur, quod Usura radix omnium vitiorum esset.* (LL. Ed. Conf. c. 37.) The doctrine, as laid down by the Mirror, is, that the goods and Chattels of Usurers should remain, as Escheats to the Lords of the Fee. (Mirror c. 1. s. 3.) The Reader will find some curious disquisitions on the subject of Usury in the Ancient Dialog. de Scaccario. (L. 2. s. 10.)

[2] Our Author alludes to the Inquisitions made under the *Justices Itinerant*, an institution generally ascribed to Henry the

and proved, who have died in this Offence,[1] and that by the oaths of twelve lawful Men of the Vicinage. Which being proved in Court, all the Moveables and Chattels which belonged to the deceased Usurer shall be seised to the King's use, without any regard to the person in whose hands they may be found. His Heir is for the same reason deprived of the Inheritance according to the Law of the Realm, the Inheritance itself reverting to the Lord. It should, however, be observed, that if any one has, during a certain period of his life, been guilty of this Crime, and be publicly accused[2] of it in the Community where he lived, if he desisted from his error before his death, and was penitent, neither he, nor his property, shall after his death be liable to the penalties of Usury. It ought, therefore, to be evident,

2nd, and, as generally, imagined to have been first ordained in the Great Council at Northampton in the 22nd year of the Reign of that Monarch. Lord Coke, however, ascribes to them a much earlier origin; and from the Records in the Exchequer, it should seem, that there had been Justices Itinerant to hear and determine Civil and Criminal causes, so early as the 18th of Henry the first. Lord Littleton thinks, the first appointment of Justices Itinerant was made by Henry the first, in imitation of a similar Institution in France established by Louis le Gros. Justices Itinerant *ad communia placita* were continued until the 10th of Edw. the 3rd, when they seem to have given way to Justices of Assise, Nisi prius, Oyer and terminer, and Gaol delivery. (Vide Madox's Exchcq. 96. Litt. Hist. Hen. 2. Vol. 4. 271. Hale's Hist. Com. Law 140. 168—2 Inst. 497.)

[1] The Mirror confines the punishment to those attainted of Usury after their decease, "but not, if they be attainted thereof "in their life-time, for then they lose but only their moveables; "because, by penance and repentance, they may amend and "have Heirs." (Mirror c. 4. s. 12. See also Fleta L. 1. c. 20. s. 28. and Dial. de Scacc. L. 2. s. 10.)

[2] Vide Book 14. Note 2.

that a Man has died a Usurer, in order that he may be so adjudged after his death, and his Effects disposed of as those of a Usurer.

CHAP. XVII.

The Ultimate Heir of any person is his Lord.[1] When, therefore, a Man dies without leaving any certain Heir, such, for example, as a Son, or Daughter, or without any such Heir of whom there can exist no doubt,[2] but that he is the nearer and right Heir, the Lords of the Fee may, and indeed, usually do, take the Vacant Inheritances into their hands, and retain them as Escheats,[3] whoever such Lord may be, whether the King, or any other person. But, if any one appear and assert himself to be the right Heir, if by the indulgence of his Lord, or by the King's precept, he can effect it, he shall prosecute his claim; and thus he may establish his right, if he has any such; but, in the mean time, the Land in question shall remain in the hands of the Lord of the Fee: because, whenever a Lord entertains a doubt concerning the Heir of his Tenant, whether he be the right Heir or not, he may retain the Land until

[1] Sir Wm. Blackstone, when speakiug of the Law of Escheat, informs us, that it is adopted in almost every country, to prevent the robust title of occupancy from again taking place. (2 Bl. Comm. 10.) See Fleta L. 6. c. 1. s. 11. "By common custom and "use only," says Skene, commenting on the Regiam Majestatem, "the King is the last Heir." (L. 2. c. 55.)

[2] The Translator follows the Reading sanctioned by all the MSS.

[3] See Co. Litt. 13. a. b.

the fact be lawfully proved to him.[1] The same rule is laid down, in a former part of this Treatise, where a doubt arises with respect to the full age or Minority of the Heir. There is, however, this difference, that in the one case, the Inheritance itself is in the mean time to be considered as the Lord's Escheat: but in the other case, it is not considered to be the Lord's—nothing, indeed, but the Custody. But if no one should appear to claim the Inheritance in question as Heir, then it shall absolutely revert to the Lord as an Escheat; so that he may dispose of it at his pleasure as his own property. Besides, if a Female Heir, in the Custody of her Lord, be guilty of Incontinence, her Inheritance shall escheat to her Lord, on account of her crime. And if any person be convicted of Felony, or confess his Guilt in Court, deprived by the Law of the Realm of his Inheritance, his Land shall remain to the Lord, as an Escheat.[2] It is to be observed, that if any one hold of the King *in Capite*, then, as well his Land, as all his Moveables and Chattels, in whose-ever possession they may be found, shall be seised to the King's use, and the Heir shall be for ever debarred from recovering them. But if an outlaw,[3] or one convicted of Felony, hold of any other person than the King, then also all his Moveables shall belong to the King; his

[1] See Bracton 71. b.

[2] How similar the Norman Code was in this respect, the Reader will perceive, on turning to *Le Grand Cust. de Norm.* c. 24.

[3] *Utlagatus*, the outlaw, or, in the expressive term of a far distant day, the *frendlesman*, or, as we should now write it, the *friendless man*. (Bracton 128. b. See Dial. de scacc. L. 2. s. 10.)

Lands also shall remain in the King's hands during one year, which period being expired, such Land shall revert to the right Lord, in other words, to him to whose Fee it belongs, the Houses, however, being thrown down, and the Trees extirpated.[1] And, generally speaking, whenever a person has done or said any thing in Court for which he has been, by a Judgment of the Court, disinherited, his Inheritance is accustomed

[1] "The reason of this," says Lord Littleton, "was a supposition, that the Lord, of whom the felon held, was in some degree "culpable, for want of a proper care in the choice of his Tenant." (2 Hist. Hen. 2. p. 118.) It is difficult to feel the force of this reasoning, from the moment fiefs ceased to be given for the life of the feudatory—for what *choice*, it may be asked, was left to the Lord, when fiefs were hereditary, as they clearly appear to have been when Glanville wrote, and for some time previously. Lord Coke ascribes the rule to another source, laying it down, that originally the King was to have no benefit from the attainder, but was to commit destruction to the property of the offender in detestation of the crime, *ut pœna ad paucos, metus ad omnes perveniat.* (2 Inst. 36.) But this is as far from being satisfactory, as the reason given by Lord Littleton. Because, as the property had ceased to belong to the offender, any waste committed on it redounded in the first place to the injury of the Lord, and through him to the public, who were both, laying all technical fictions aside, innocent. The punishment to the Tenant was the *forfeiture*, and not the waste subsequently committed. This cruel policy, or rather impolicy, was abrogated by the 22nd Chapter of Magna Carta. The Reader will consult Lord Coke's comment on that Chapter, and then judge for himself, whether the year and a day came in lieu of the waste. That they were co-existent seems strongly corroborated by the Custumal of Kent—"The King shall have the year *and* the waste." (Robinson on Gavelk. 284. See also Ibid c. 4.) The Mirror is here, as in many other instances, at variance with itself. But Britton appears to consider them as co-existent. (c. 18. s. 6.) and so does the Regiam Majestatem. (L. 2. c. 55.)

Lord Coke has with his usual industry, collected the authorities in favor of his position. Dr. Sullivan may be added to them. (Lectures p. 348.)

to return as an Escheat to the Lord of the Fee of whom it is held. But a forfeiture, committed by the Son and Heir of any one, shall not disinherit the Father, nor the Brother, nor, indeed, any other person but himself. It should also be added, that when a Man has been condemned of Theft, all his Moveables and Chattels generally devolve on the Sheriff of the County; but his Land, if he has any, shall immediately revert to the Lord of the Fee, without awaiting the year.[1] When any one has been outlawed by the Law of the Land, and has afterwards, by the indulgence of the Prince, been restored to the Peace, he cannot on that account recover his Inheritance, supposing that he or his Heirs possess such, as against his Lord (unless by the mercy and indulgence of the Lord himself.) The King, indeed, is accustomed to remit the pains of Forfeiture and Outlawry, yet cannot he, under colour of this prerogative, infringe upon the rights of others.

CHAP. XVIII.

Of Marriage-hood—the one kind is free, the other, liable to the performance of services.[2] Marriage-hood is called free, when any free-man gives a certain part of his Land with a Woman in Marriage to another, so that such Land be exempt from every kind of service,

[1] The Reader will recollect, that when Glanville wrote, Theft was not an offence against the King's crown. Chap. 2. L. 1.

[2] Vide Note 1. c. 1. of this Book.—Bracton 21. a. b. and Fleta. L. 3. c. 11.

and acquitted on the part of him and his Heirs, as against the Chief Lord. The Land in question shall enjoy this immunity, even to the third Heir;[1] nor, during the interval, are the Heirs bound to do any Homage for it; but, after the third Heir,[2] the Land again becomes subject to its original services, and Homage shall be received for it, and, if it be part of a Military Fee, the Tenant shall perform the service of the Fee, with reference to the quantity of the Land. But sometimes Land is given in Marriage-hood, saving and reserving the services due to the Chief[3] Lord; and then indeed, the Husband of the Woman and his Heirs must perform the services, with the Exception of Homage, even to the third Heir.[4]

But the third Heir shall do Homage for the first time, and all his Heirs afterwards. But another Fealty,[5] with the interposition of a solemn promise or oath, shall, in the intervening period, be performed by the Women and their Heirs, almost in the same form

[1] In enumerating these degrees, say Bracton and Fleta, *Donatarius primum faciat gradum, heres ejus secundum gradum &c.* (Bracton fo. 22. b. Fleta L. 3. c. 11. s. 1.)

[2] *Nor, during the interval, are the Heirs bound to do any Homage for it, but, after the third Heir,*—omitted by the Harl. and Bodl. MSS.

[3] All the MSS. concur in omitting the word *chief*.

[4] "And the third Heir shall make Homage, therefore, Ward "and Relief, and all his Heirs after him." (Regiam Majest. L. 2. c. 57.)

[5] "And another fealty, by making of an oath and faith, shall "be given and made by the Woman and her Heirs, in the same "form and words as Homage should be made." (Reg. Maj. L. 2. c. 57.)

and in the same words in which Homage is commonly performed.

When, therefore, any one has received Lands with his Wife in Marriage-hood, and has by her an Heir, Male or Female, heard to cry within the four Walls, then, if the man survive his wife, whether the Heir live or not, the Marriage-hood shall notwithstanding remain to the Husband, during his life; but, after his death, it shall revert to the original Donor, or his Heirs.[1] But if he never had an Heir from his Wife, then, immediately after her death, the Marriage-hood shall revert to the Donor or his Heirs.[2]

[1] What our Author treats of, as a consequence of a Man's receiving lands in marriage-hood, has received considerable extension in succeeding times, and has become known by the Title of the *Curtesy of England*. But, as Lord Coke observes, it was known to the *Scotch* and *Irish*, and, he might have added, to the *Normans*. Craig cites a passage to shew that it was not unknown to the *Roman* Code, and Sir Wm. Blackstone quotes an authority to prove that it was in use amongst the ancient *Almains* or *Germans*. Like Dower, it is not a provision arising from the compact of the parties, but emanating from the liberality of the Law. As to the evidence of the existence of the offspring, the Regiam Majestatem expressly coincides with our Author, (L. 2. c. 58.) and in this, is followed by Bracton, Fleta, and Britton. Lord Coke, however, asserts, that if born alive, it is sufficient, though not heard to cry, which, indeed, is consistent with reason—for the crying of the child is merely *evidence* of life—which may as well be furnished by a thousand other circumstances. It is not improbable, that as an adherence to the strict Letter of the ancient Law, as laid down by Glanville, had been found extremely inconvenient, it had, therefore, been silently abrogated, previous to the time of Lord Coke. (See Craig, L. 2. D. 22. s. 40. Le Grand Custum. de Norm. c. 120. 2 Bl. Comm. 125. and Co. Litt. 29. b.)

[2] He forfeited it under the Norman Code by a subsequent marriage, with another woman. (Le Grand Custum. de Norm. c. 121.)

And this is some reason why Homage is not usually received for Lands in Marriage-hood.

For if Land were so given in Marriage-hood, or in any other way, that Homage was received for it, then, it would never afterwards revert to the Donor, or his Heirs, as we have explained. If, however, such Woman take a second Husband, the same Rule prevails, as to the second, as we have stated concerning the first, whether the first should have left an Heir or not. But when any one sues for Land as the Marriage-hood of his Wife, or when the Woman or her Heir does so, then, a distinction must be made, whether the Land is demanded as against the Donor, or his Heir, or against a stranger. If the Suit be against the Donor, or his Heir, then, it is at the Election of the Demandant, whether he would proceed in the Court Christian, or in the Secular Court.

For if the Demandant chuses to resort to such Tribunal, it belongs to the Ecclesiastical Judge to hold pleas of Marriage-hood ; a Jurisdiction he acquires from the mutual Troth usually plighted, when any one promises to marry a Woman, and she in her turn promises marriage to him. Nor, indeed, is the Ecclesiastical Judge prohibited by the King's Court from holding such plea, although it concern a Lay-fee, if it be clear that the demand relate to Marriage. But if the Suit be brought against a Stranger, then, indeed, it shall be determined in the Lay Court, and that, in the same manner and order in which Pleas concerning other Lay Fees are generally conducted.

Yet, should it be observed, that the Suit ought not to be proceeded in, without the Warrantor, as we formerly mentioned when treating of Dower. The Suit, indeed, must be proceeded in, as far as respects the Warrantor, in the same manner as a Plea in Dower. What we, therefore, said on the former occasion with respect to this point, is applicable to the present. It remains to add, that the third Heir, after he has once done Homage, can[1] proceed in the suit without the authority of the Warrantor.

[1] All the MSS. concur in introducing *not* into the text.

Book VIII.

OF A CONCORD MADE IN COURT; AND OF THE CHIROGRAPHS CONTAINING THE CONCORD; AND OF THE RECORDS OF THE COURT OR COURTS, IF EITHER OF THE PARTIES SHOULD BREAK THE CONCORD, AND FINE, MADE IN COURT.

CHAP. I.

But it often happens, that Pleas moved in the King's Court are determined by an amicable composition and final Concord, but with the consent and License of the King or his Justices, whatever the Plea may concern, whether Land, or any other thing. Such a Concord is, with the general consent of the persons interested, usually reduced into a writing, common to all the parties,[1] which is recited before the King's Justices of the Common Pleas,[2] in whose presence each person's part of the writing, agreeing in all things with the other's, is delivered to the party. The Concord is in the following form——

[1] *In communem scripturam*, a chirograph. (Madox's Exch. c. 19.)

[2] *Justiciis domini regis in Banco residentibus*—Vide ante page 41. Note 2.

CHAP. II.

"THIS is the final Concord, made in the Court of "our Lord the King, at Westminster, on the Vigil of "the blessed Peter, the Apostle, in the Thirty-third[1] "Year of the Reign of King Henry the Second; before "Ranulph de Glanville, Justiciary of our Lord the "King, and before *H. R. W.* and *T.* and other faithful "subjects of our Lord the King, then there present, "between the Prior and Brethren of the Hospital of "Jerusalem, and *W. T.*, the Son of Norman, and Alan "his Son, whom he appointed Attorney in the Court "of our Lord the King to gain or lose, concerning all "such Land and its Appurtenances (except one Oxland[2] "and three Tofts[3]) which the said *W.* held: concern-

[1] This and a similar passage, in the following chapter, afford strong *data*, from whence to ascertain the year, when the present work was written. Admitted as it is, on all hands, that it was composed in the Reign of Henry the Second, and it being a strong presumption from the passages in question, that it could not have been written antecedent to the 33d year of such Reign, it merely remains for us to chuse between the 33d, 34th, and 35th years; for on the latter year the Reign terminated. If we follow Sir Henry Spelman's plan, and divide the intermediate period, we should infer that the present work was written in the 34th year of Henry the Second, in other words, in 1187. Dr. Robertson, though without alleging any reason, says, it was composed about the year 1181. (Hist. Charles. V. vol. 1. p. 296.) Blair's chronology uses precisely the same assertion.

[2] It seems by no means to be agreed of what quantity an Oxland consisted. (Co. Litt. 69. a. and Mr. Hargrave's note.)

[3] Toftis. A Toft is said to be the scite where a House formerly stood; and is a word much used in Fines. (Vide Spelm. Gloss. and Cowell's Interp. ad voc.)

" ing all which Land (except the aforesaid Oxland and " three Tofts) there was a Plea between them in the " Court of our Lord the King; to wit, that the afore- " said *W.* and Alan concede and attest the Gift which " Norman the Father of the said *W.* made to them; " and they quit-claim all that Land from them and " their Heirs to the Hospital and the aforesaid Prior " and Brethren for ever: except the one Oxland afore- " said, and the three Tofts, which remain to the said " *W.* and Alan and their Heirs, to be held of the Hos- " pital and the aforesaid Prior and Brethren for ever, " by the free service of four pence a year, for all serv- " ice. And for this concession, and attestation, and " quit-claim, the aforesaid Prior and Brethren of the " Hospital have given to the said *W.* and Alan one " hundred Shillings sterling." Or in these Terms——

CHAP. III.

" This is the final Concord, made in the Court of " Galfred, the Son of Peter, and afterwards recorded " and inrolled[1] in the Court of our Lord the King, " at Westminster, in the Thirty-third Year of the " Reign of King Henry the Second, on Tuesday after " the feast of the Apostles Simon and Jude, before[2] " *E.* Bishop of Ely, and *I.* Bishop of Norwich, and

[1] *And inrolled* omitted by the Bodln. and Dr. Milles's MSS.

[2] *G. Bishop of Ely, I. Bishop of Norwich, and Ranulph de Glanville, &c. Justices in Eyre, in the year* 1179, 25 *Hen.* 2. *&c.* according to Bodl. MS.

" *R.* de Glanville, Justice of our Lord the King, and " other faithful and trusty servants of our Lord the " King, then there present, between the aforesaid *G.* " the Son of Peter and *R.* the son of Reginald, of the " Advowson of the Church of All Saints of Shuld- " ham, and common of pasture of Heddon, con- " cerning which there was a dispute between them ; " to wit, that the aforesaid *R.* has acknowledged " to the aforesaid *G.*, as his Right, the Advowson of " the aforesaid Church, and has quitted-claim to the " aforesaid *G.* and his Heirs, from him and his Heirs " for ever, if he had any right in the Advowson " of the aforesaid Church: also the aforesaid *R.* " quit-claims to the aforesaid *G.* the Common of " Pasture of Heddon—And all the purprestures[1] " which *G.* has made in Shuldham, in the Wood- " land[2] and Mills and Crofts[3] and Turbaries[4] of " Shuldham, of which the said *R.* reserves nothing, " unless that which is necessary to burn in his House for " him and his Heirs, without making any sale; and

[1] Vide Infra, L. 9. c. 11. where our author explains the import of the Term.

[2] *Frusseto*, or, as Lord Coke writes it, *frasseto*, signifies a wood or ground that is woody. (Co. Litt. 4. b.)

[3] *Croftis.* A croft is said to be synonymous with what farmers call a *close.* The term is used by Ingulphus, and derived from the Saxon *croft* or *cruft.*

[4] *Turbariis.* This word is of Saxon origin, and seems to have been used in two senses; first, for the right of taking turf; secondly, for the ground from which the turf itself was taken or dug. (Spelm. Gloss.) The reader will no doubt admire ecclesiastical ingenuity, when he understands, that turbary was comprised under the term *lignum*, and Tithe consequently claimed in respect of it. (Lyndw. Provinc. p. 100. Annot. ad *turvarum.*)

"all [1] external folds,[2] (except his own) and the bidden "days [3] of external ploughs, and the Customs [4] of Hens

[1] *Forinseca*—So termed, Bracton tells us, *quia fit et capitur foris, sive extra servitium quod fit domino capitali.* (Bracton, fo. 36. a.) This part of the text is rather obscure; and, though I have taken some pains to get at the sense of all the terms Glanville makes use of in this Concord, I cannot flatter myself I have perfectly succeeded.

[2] *Faldas. Falda* is frequently used, as Spelman informs us, *pro libertate faldagii—faldagium* being a privilege, which Lords anciently, not unfrequently, reserved to themselves, of setting up folds for sheep in any fields within their manors, the better to feed their flocks, and this, not merely with their own but their Tenants' sheep, although, in the latter case, the privilege was more usually called *secta faldæ.*

It should rather seem, that the Tenants sometimes enjoyed such a privilege as against their Lords. *Falda* i.e. *homines villæ debent ponere oves suas in faldam Domini*, are the words of an ancient MS. relating to the Monastery of St. Edmund. When the term *forinsecas* is attached to *faldas*, a difficulty occurs, which perhaps may be got over by recurring to the doctrine of subinfeudation, so common when Glanville wrote. The privilege in question might have been *within* the boundaries of the ancient or original manor, whilst it might have been external or *without* the circuit of a less manor, forming merely a part of the original manor and created in a course of posterior subinfeudation.—This is submitted merely as a conjecture.

[3] *Precarias.* "Vide Somn. Tract. de Gavelkynd in voc. *Benerth*, p. 18." (Al. MS.) "*Benerth*, says Lord Coke, signifieth the "service of the plough and cart." Co. Litt. 86. a. *Precariæ* are said to be day-works, which the Tenants of some manors are bound, by reason of their tenures, to do for their Lords in Harvest-time; and they are in some places called *bind-days* for *bidden-days*, since, as it has been remarked, *bidden* est *precari.* This custom is said to be plainly set forth in the Great Book of the Customs of the Monastery of Battel tit. Appelderham fo. 60. an extract from which the reader will find in Spelm. Gloss. ad voc. *precariæ.* Somner, indeed, considers it a species of Tillage service, performed *precario.* (Ubi Supra.)

[4] *Consuetudines*, meaning, perhaps, customary renders, or payments, as Rents. It is well known, that a period of our History

"and Eggs. And for this Concord and quit-claim, the "aforesaid *G.* has given to the said *R.* twenty marks "of silver." And observe, that such a Concord is termed final, because it puts an end to the matter,[1] so that neither of the litigating parties can ever after recede from it. For if either of them fail to adhere to it, or to perform his part of it, and the other party complain, the Sheriff shall be directed to put him by safe pledges, that he appear before the King's Justices to answer, wherefore he has not kept such fine. I mean, if the party complaining, has previously given the Sheriff security, to prosecute his claim. For this purpose, the following writ shall issue——

CHAP. IV.

"The King to the Sheriff, Health. Command *N.*, "that justly and without delay, he hold the Fine made "in my Court, between him and *R.* of one Hyde of "Land, in that Vill, concerning which a Suit was be- "tween them in my Court; and, unless he do so, and

has existed, when most of the Rents of the kingdom were paid in this manner.

[1] A similar description occurs in the Reg. Maj. (L. 1. c. 27.) and in Bracton. (L. 2. tr. 5. c. 28.) Lord Coke quotes the latter, as well as the passage in the text, as correct. "This," observes Mr. Hargrave, "though a just description of fines, according to "their original and still apparent import, yet gives a very inade- "quate idea of them in their modern application. In Glanville's "time, they were really amicable compositions of *actual* Suits. "But for several centuries past *fines* have been only so in *name*." (Co. Litt. 121. a. and note 1.) "For the antiquity of Fines," says Lord Coke, "it is certain, they were frequent before the Con- "quest." (2 Inst. 511.)

"the aforesaid *A.* make you secure of prosecuting his "claim, then, put him by Gage and safe Pledges that "he be before me or my Justices on such a day, to "shew why he has not done it. And have there this "Writ. Witness, &c."

CHAP. V.

Should the party, thus summoned, neither appear, nor essoin himself, on the day appointed, or if, after having cast three Essoins, he neither appear, nor send an Attorney, the course in such case to be pursued has been already pointed out, in that part of this Treatise which applies to Pleas, where the Pledges are to be attached, and in the first Book. Both parties being present in Court, if each of them should acknowledge the writing (containing the Concord made between them) or if the Concord is stated to be such by the King's Justices before whom it was made, and this be properly testified by their Record, then the Party who has broken the Concord shall be amerced to the King, and shall be safely attached, until he find good security that he will from thenceforth keep the Concord, by adhering to its terms, if possible, or will otherwise make his Adversary a reasonable recompense. For, it is a consequence which naturally results from acknowledging a fact in the King's Court in the presence of the King or his Justices, or undertaking to do any particular Act, that the Party should be compelled to abide by or perform it. If, however, such a Concord

be made in a suit concerning Land, then, the party convicted in Court, or confessing that he had not properly observed the Fine, if a Tenant, shall thereby lose his Land, but, if a Demandant, his Suit. But if the parties, either the one or the other of them, deny the Common Chirograph, then, the same Justices shall be summoned to appear on a day appointed to them in Court, and there record, how the suit came to an end which was before them in the King's Court, between such and such parties, of so much Land, in that Vill, which the one claimed against the other; and, if the parties, by the license of the Justices and in their presence, came to an agreement, under what form the Concord was made. But here a distinction must be taken, whether such Concord was made in the King's chief Court, or before the Justices Itinerant.

In the latter case, such Justices must be summoned to appear in Court, with certain discreet Knights, of the County where the Concord in question was made, who were present when it was entered into, and know the truth of the fact; in order that such Justices may make a Record of the Suit, with the assistance of the Knights, who are to be called to Court for that purpose, from the whole body of the County, by the following Writ——

CHAP. VI.

"The King to the Sheriff, Health. Summon, by "good Summoners, *N.* and *R.* that they appear before

"me, or my Justices, such a day, to record, with dis-
"creet Knights of that County, how the Plea of one
"Hyde of Land, which *N.* claimed against *R.*, in that
"Vill, and of which there was a Suit before them, on
"their Eyre, ceased in my Court." The Sheriff of the County, in which the Suit was decided before the Justices, shall also be commanded to transmit at the same time a Record of the Suit in question to the King, or his Justices, by the hands of discreet Knights of his County. This shall be done by the following Writ, for presenting such Record in Court—

CHAP. VII.

"The King to the Sheriff, Health. I command you,
"that you cause to be recorded in your County Court,
"the plea which is between such and such person, con-
"cerning so much Land, in that Vill," &c. as in the following Chapter but two.

CHAP. VIII.

The Justices being present in Court, and perfectly concurring as to the Record, it necessarily follows, that their Record must be abided by, neither party being allowed to deny it, as we have already observed.

But if the Justices entertain any doubt upon the subject, and it cannot be ascertained, then, the Plea must be again commenced and proceeded on in Court.

CHAP. IX.

It should be understood, that no Court, generally speaking, has a Record, except the King's Court.[1] For in other Courts, if a Man should say a thing, which he would afterwards retract, he may deny[2] it against the whole Court, by the oath of three witnesses, affirming that he had not said the thing imputed to him, or, indeed, by a greater or less number of witnesses, according to the custom of different Courts. Yet, in some cases, the County and other inferior Courts are by a particular Law of the Realm allowed to have Records; thus, if the Duel has been waged in any inferior Court, and the Suit should be afterwards transferred into the King's Court; then, as to the claim of the Demandant, the defence of the Tenant, and the words in which such Duel was adjudged and waged, the former Court shall have its Record even in the King's Court; but, in other respects, such inferior Court has no Record, unless concerning the change of a Champion. For if, after the suit has been transferred into the King's

[1] V. LL. Gul. 1. Norman. cap. 28. (Al. MS.) The Law alluded to is in these words. *Qui placitat in Curia cujuscunque Curia sit, excepto ubi persona Regis est et quis eum sistat super eo quod dixerit, rem quam nolit confiteri, si non potest disrationari per intelligentes homines qui interfuerunt placito et videntes quod non dixerit, recuperit juxta verbum suum.* (LL. Anglo-Sax. Ed. Wilkins, p. 224.)

[2] *Recordationem Curiæ Regis nulli negare licet alias licebit per intelligibiles homines Placiti.* (LL. Hen. 1. c. 31. See also LL. Hen. 1. c. 49 and Co. Litt. 117. b.)

Court, a different Champion should be produced, than the one who has waged the Duel in the inferior Court, and a dispute arise upon this point, the Record of the inferior Court shall by a Law of the Realm be conclusive upon the subject. It should also be understood, with respect to the Record of an inferior Court, that any one may add, that he had said more than is contained in such Record—and that he did in Court say it, he may prove against the whole Court, by the oaths of two or more lawful Men, according as the custom of different Courts vary; because no Court is bound, either to prove or defend its Record by the Duel. But it is not allowed to any one to take exceptions against one part, and admit the other; and this rule is grounded on a Law of the Realm: since he may from the first deny the whole Record, an oath being taken in the manner before mentioned. But, although a Court is not obliged to defend its Record by the Duel, yet is it bound to defend its Judgment by the Duel.[1] If, therefore, any one should declare against the Court for passing a false Judgment, and, therefore false, because when one party had said thus, and the other answered thus, the Court in question had judged falsely of their allegations by deciding in such words; and that the Court had given such false Judgment by the mouth of *N.*; and, if he were disposed to deny the present charge, the other was prepared to prove it against him, chiefly by such proper witness, who was ready to enter upon the proof. Thus may the matter, and

[1] "*By the Duel*," omitted by Harl. Bodl. and Dr. Milles's MSS. although from the context, it must be understood.

that very properly, be decided by the Duel.[1] But, whether such Court is obliged to defend itself by one of its own members, or may have recourse to a stranger, may be questioned?

It ought, indeed, to defend itself chiefly by the person who has passed the Judgment·[2] and, if the Court should be convicted of the charge, the Lord of the Court shall be amerced to the King, and shall for ever be deprived of his Court. Besides which, the whole Court shall be amerced to the King. But, if the person bringing the charge forward should fail in his proof, he shall thereby lose his principal suit. A Court may also have a Record, by the indulgence of the Prince. Thus, if the King, influenced by some reasonable motive, should cause any Court to be summoned to make a Record in his Court; so that the King chuses, that such Record shall not be contradicted. Courts are frequently summoned to have a Record of some particular suit before the King, or his

[1] The liberty of falsifying a Judgment was allowed by the Assises of Jerusalem. But the person, availing himself of this dangerous privilege, seems to have been obliged to fight all the persons composing the Court, not merely the Judges, but the Suitors, one after the other. Under these circumstances, the privilege would, probably, not often be claimed. (Assis. de Jerusalem, c. 111.)

[2] See Mirror, c. 3. s. 23. A Judge, who had given a false Judgment, is heavily fined to the King by the Laws of Edgar, unless he dared confirm upon his oath, that he knew not how to pass a better sentence. (LL. Edg. c. 3.) By the Laws of the Conqueror, such Judge lost his *were*, unless he could excuse himself by the same means. (LL. Gul. Conq. c. 15.) By the Laws of Alfred, he was, after having made satisfaction to those he had injured, to forfeit the remainder of his goods to the King, &c. &c. (Mirror, c. 4. s. 18.)

Justices, although they have not from this circumstance any Record but what may be contradicted; because, by the consent of the parties, the suit may be proceeded in upon that Record.

If they agree as to the Record, the Summons may be made, by a writ of the following description——

CHAP. X.

"The King to the Sheriff, Health. I command you, "that you cause to be recorded in your County Court, "the suit which is between such and such persons, of "so much Land, in such a Vill; and have the Record of "that suit before me, or my Justices, at such a day,[1] by "four Lawful Knights, who were present at the mak-"ing of such Record—And Summon, by good Sum-"moners, the party claiming the Land, that he be then "there with his Plea; and the party who holds "the Land, that he be then there to hear it.[2] And "have, &c."

CHAP. XI.

Inferior Courts have also Records concerning things transacted in them, which are received as such in the King's Court. This happens when a Lord[3] has a Plea in his Court, concerning which a reasonable difficulty

[1] *Terminum*—Vide ante. p. 22. not. 2.

[2] *The Record*—Bodl. and Dr. Milles's MSS.

[3] *Baro—hoc est robur beli*, says Bracton. The term was for-

arises, and the Court is incompetent to determine it. On such an occasion, the Lord himself may adjourn his Court[1] into the King's Court, in order to have the advice and assent of the latter, in determining what is proper to be done. The King, indeed, owes this assistance to his Barons, who may on such an occasion, as a matter of right, adjourn their Courts into the King's Court, in order to obtain from the skilful men who preside there, that advice they stand in need of. But, when they have been certified in the King's Court, concerning the doubtful point, they may return with the Suit, resume the consideration of it, and finally determine it in their own Court.[2] The County Court has a Record, as to the giving and receiving pledges there, and of similar matters.

merly used in a variety of senses.—I shall mention some of them—a Man, a hired Soldier, an Officer, a Tenant, a lesser Tenant in chief, a greater Tenant in chief, a Noble, an Ecclesiastical Dignitary, a greater Vassal of an Earl or Prelate, a Knight, a Husband, an Eldest Son, a Burgess, a Citizen, a Robber, &c. (Vide Spelm. Gloss. ad voc. Cowell's Interp. Craig. Jus. feud. L. 1. Dieg. 12. s. 15. 16. 2 Inst. 5.—Madox's Exchcq. c. 5. s. 1. Index to Anglo-Sax. LL. Ed. Wilkins, voc. Baro—and authorities referred to by such authors.)

[1] *Suit*, instead of *Court*, according to Harl. and Bodl. MSS.

[2] Lords, at first, had but a domestic Jurisdiction, in order to compel their Tenants' Services, and to maintain peace and order amongst them. Afterwards, in imitation of the Sovereign's Court, Lords caused Records to be made before their own officers of the transactions which had taken place in their Courts. But, as these Records derived their chief or rather only strength, from the parties voluntarily submitting to them, the authority of the Lords was gradually weakened ; and, as murmurs began to increase against the decisions of their Courts, a reference to the King's Court became the only resort of the Lords. (Traites sur les Coutumes Anglo-Normandes par M. Houard, p. 507. Tom. 1.)

Book IX.

OF HOMAGES, AND RELIEFS, AND SERVICES, AND AIDS, AND OF PURPRESTURES, AND BOUNDARIES DISTURBED.

CHAP. I.

It remains to resume the subject of performing Homages,[1] and receiving Reliefs.[2] Upon the death of

[1] *Homage*, the result of the Feudal System, was unknown to the Romans; and Spelman thinks, it was unknown to the Anglo Saxons. (Reliq. p. 34.) However that may be, William the Conqueror is stated to have received it from the Nobles, immediately after the Battle of Hastings. (M. Paris.) It is generally derived from the word *homo*, which, as well as our synonymous term *man*, Spelman asserts, to have been used for many ages by the German and Western Nations, for a servant or vassal. (Spelm. ubi supra—sed vide Co. Litt. 64. b.) Homage is divided into *liege* and *feudal*: the former was due to the King, the latter to the Lord, of whom the Tenant held his Fee. "The reason of Hom-"age, says Spelman, was to preserve the memory of the tenure, "and of the duty of the Tenant. by making every new Tenant at "his entry to recognise the Interest of his Lord, lest that the "feud, being now hereditary, and new Heirs continually suc-"ceeding to it, they might by little and little forget their duty "and subtracting their services deny at last the tenure itself." (Spelm. Reliq. 34.) On Homage in general see Bracton 78. b. et seq. Fleta l. 3. c. 16. Littleton's Tenures and Lord Coke's Comment. Craig, Spelman, Sullivan, Assises de Jerusalem c. 205. &c. &c. &c.

[2] *Relief—quia hereditas, quæ jacens fuit per antecessoris decessum, relevatur in manus heredum et propter factam relevatio-*

the Father, or any other Ancestor, the Lord of the Fee is bound, from the first, to receive the Homage of the Right Heir, whether the Heir has attained his full age, or not, if he be a Male. For, Females cannot by Law perform any Homage,[1] although, generally speaking, they are to do Fealty to their Lords.

nem facienda erit ab herede quædam præstatio, quæ dicitur relevium. (Vide Bracton 84. et Fleta l. 3. c. 17. s. 1.) Among the Laws of Edward the Confessor, there is a singular one, respecting the Relief of a Tenant who fell in battle. (LL. Edw. Conf. c. 35.) It must, however, be observed that Spelman questions that Law, and strongly contends, that Reliefs were not in use among the Saxons. (Reliq. p. 31.) The Reader will find that point controverted in the preface to Wilkins's Anglo Sax. LL. p. 9. The Reader, if desirous of extending his enquiries on Reliefs in general, may consult Bracton 84. et seq. Fleta L. 3. c. 17. Co. Litt. 76. a. 83. a. Black. Com. Sullivan, Craig, Spelman &c. &c. &c.

[1] "Glanville," observes Lord Coke, "saith, that Women "shall not do Homage: but Littleton saith, that a Woman "shall do Homage, but she shall not say, *Jeo devigne votre feme*, "but *Jeo face à vous homage*; and so is Glanville to be under- "stood, that she shall not do complete Homage." (Co. Litt. 65. b.) Having cited this passage, a noble Historian observes "But "I should rather think, that in Glanville's time single women "did none, and that the alteration in the form, which is men- "tioned by Littleton, was an expedient found afterwards to ob- "viate the objection of an indecency in their Homage: as it "was also in the case of Ecclesiastics." (3 Litt. Hist. Hen. 2. p. 339.) *Skene* gives a reason for the rule as laid down by *Glanville: because Homage especially concerns service in war*, (de verb. sign. ad voc. homagium.) He also remarks, that consecrated Bishops did no homage. The reason, says Cowell, may be all one. (Interpreter) But Craig. (Jus. Feud. 1. 11. 10.) and the Regiam Majestatem (L. 2. c. 60.) expressly coincide with our Author. Indeed, if any doubt could possibly exist, concerning the unconditional meaning of the passage in the text, it would be silenced by the latter part of the present chapter. Having made use of the expression *liber homo*, our author pointedly adds, *masculus*, as if solicitous to prevent any possible misconception, especially that very misconception Lord Coke seems to have

But, if they are married, their Husbands ought to do Homage to their Lords for their Fees; I mean, if Homage be due in respect of such Fees. If, however, the Heir be a Male and a Minor, the Lord of the Fee is not entitled by Law to the Custody, either of the Heir, or his Inheritance, until he has received the Homage of the Heir; because, it is a general principle, that no one can exact from an Heir, whether he is of age, or not, any service, consisting in a Relief or otherwise, until he has received the Homage of the Heir, in respect of that Tenement, for which the service is claimed. But a person may perform Homage to several Lords on account of different Fees; but, of these Homages, one should be the chief, and accompanied with allegiance,[1] and this must be made to the Lord, from whom the person performing Homage, holds his Chief Estate. Homage ought to be done in this form, namely, the party performing it shall so become the

fallen into, which is likewise refuted by a custom mentioned by Lord Littleton. "From the obligation laid on the Husband to "do Homage for the wife, it naturally followed, that the Barony "of a wife, as well as every other Fief requiring Homage, was "in effect made over to the Husband; and, therefore, in those "days many Barons came to Parliament in right of their wives, "and by virtue of their marriage, were accounted Peers of the "Realm. It has been observed, in this History, that the same "notion extended to Dukedoms and Principalities in many parts "of the Continent." (Litt. Hen. 2. p. 339.)

[1] We have observed, that homage was divided into, *liege* and *feudal:* it was also divided into, *liege* and *not liege*, which division corresponds with the other. *Liege* is borrowed from the French, as Thaumas informs us. (Cout. de Beauvoisis p. 255.) and seems to have meant a service that was personal and inevitable. (Traites Sur Les Cout. Anglo-Norm. par Houard. p. 511. Tom. 1.)

Man of his Lord, that he shall bear faith to him for the Tenement in respect of which he does Homage,[1] and shall preserve the Lord's terrene Honor in all things, saving the faith due to the King,[2] and his Heirs.

From this it is evident, that a Vassal cannot injure his Lord, consistently with the Faith implied in Homage; unless, possibly, in his own defence, or unless, in compliance with the King's precept, he join his Army when it proceeds against his Lord; and, generally speaking, no one can by Law, consistently with the Faith implied in Homage, do any thing which tends to deprive his Lord of his Inheritance, or to affix a personal stain upon him.[3] If, then, a Tenant has in respect of several Fees done Homage to different Lords, who afterwards make war on each other; and the Chief Lord should command the Tenant to accompany him in person against another of his Lords, he ought to yield

[1] In performing Homage, the Tenant was to name and specify the particular Tenement, on account of which he did Homage, in order that the Lord might not be imposed upon. (Britton 174. Mirror c. 3. s. 36.)

[2] "In the year 1152, the Emperor Frederic Barbarossa made a "Statute, that in every oath of fealty taken to any of his sub- "jects, there should be a reserve of the faith due to him and his "successors; which immediately was adopted by several other "nations, where the feudal Law was in use, with regard to their "sovereigns, and, the omission of that reserve was punished "in England by a judicial determination under Edward the "first." (3 Litt. Hen. 2. p. 111.) This reserve was also required by the Book of Feuds L. 2. t. 55. Regiam Maj. L. 2. and Grand Cust. Norm.

[3] Vide Mirror c. 4. s. 10. and 11, and Le Grand Cust. de Norm. c. 14.

obedience to this Mandate, saving however the service due to the other Lord for the Fee held of him.

From what has gone before it is evident, that if a Tenant should do any thing to the disinherison of his Lord, and should be convicted of it, he and his Heirs shall according to the Law for ever lose the Fee held of such Lord.[1] The same consequence will follow, if the Tenant lay violent hands on his Lord to hurt him, or to commit any atrocious injury upon him, and this be lawfully proved in Court against the Tenant. But, it may be asked, whether any one can be compelled in the Lord's Court, to defend himself against the Lord from such charges; and whether his Lord can, by the Judgment of his own Court, distrain the Tenant so to do, without the Precept of the King, or his Justices, or without the King's Writ, or that of his Chief Justice?

The Law, indeed, permits a Lord by the Judgment of his Court to call upon and distrain his Homager to appear in Court, and, unless he can purge himself against the charge of his Lord by three persons, or as many as the Court should award, he shall be amerced to the Lord, to the extent of the whole Fee that he holds of him.

It may also be enquired, whether a Lord can distrain his Homager to appear in Court, and answer for a serv-

[1] As the Tenant could not injure his Lord, neither could the Lord injure his Tenant. If the violation of this obligation was punished on the Tenant's part, by the loss of his Tenement, the Lord, when the Aggressor, lost his Dominion. (Fleta L. 3. c. 16.)

ice, of which the former complains the Tenant has deforced him, or of which some part is unpaid?

The Lord, indeed, by Law may well do so, even without the precept of the King, or his Justices. And thus the Lord and his Homager may proceed to the Duel, or the Grand Assise, by means of one of the Peers,[1] who chuses to make himself a Witness[2] of the fact, as having seen the Tenant himself, or his Ancestors, perform such service for the Fee in dispute to the Lord or his Ancestors, and is prepared to prove the fact. But, if the Tenant be convicted of this charge, he shall by Law be disinherited of the whole Fee, which he holds of his Lord. If, however, any one is unable to constrain his Tenants, it then becomes necessary to have recourse to the Court.[3] Every free Male person may perform Homage, whether of full age, or otherwise, whether a Clergyman or Layman. But consecrated Bishops are not in the habit of doing Homage to the King, even for their Baronies; but merely Fealty, accompanied with an oath. But Bishops elect

[1] *Parium.* Vide 2 Inst. 42. Spelm Gloss. ad voc.—*Pares enim sunt cum unus aliis non subditur Hommagio, Dominatione, vel Antenatione. Hommagio ut Homo subditur Domino suo cui fecit Hommagium Dominatione, ut Homo subditur uxoris domino et ejus primogenito filio: et omnes postnati ratione antenationis.* (Grand Custum. de Norm. c. 126.)

[2] This differed from the Norman code, which, in a tone of haughty despotism, released the Lord from the necessity of adducing any testimony. *Vox enim sola Domini Curiæ in iis quæ ad ipsum pertinent sufficit ad accusationem subditorum.* (Grand Cust. c. 126.) Perhaps a worse principle never disgraced an Eastern code.

[3] That is, the King's Court.

are accustomed to do Homage, previous to their Consecration.[1]

CHAP. II.

But Homage is due only for Lands, free Tenements, Services, Rents in certain, whether in Money, or in other things. But, in respect of Dominion[2] alone, Homage ought not to be rendered to any one, except to the King. Yet Homage is not always performed for every species of Land. Thus, it is not due for Land in Dower, nor for free Marriage-hood, nor from the Fee of Younger Sisters holding of the Eldest, within the third descent on both sides[3]; nor is it due from a

[1] "Pope Paschal the 2nd," observes Lord Littléton, "allowed "the *Bishops elect* to do Homage, and take the oath of Fealty, "*before they were consecrated.* This was confirmed by the Con- "stitutions of Clarendon, of which a particular account will be "given hereafter; and, from the words of Glanville, it appears, "that about the end of Henry the 2nd's reign Homage was ac- "cordingly done by *Bishops elect*, but he tells us, that *after they* "*were consecrated* they took the oath of fealty. This was a "material difference from what had been settled by the consti- "tutions of Clarendon: and it is surprising, that we have no "account of it in the History of the Times." (Litt. Hen. 2. Vol. 3. 113.)

[2] Pro *Domino* is the expression of the text, which I have disregarded—but have preferred, what, I submit, must be the true reading, pro *Dominio*, for so Bracton has it in a passage corroborative of the doctrine of the text. (79. b.) And with this concurs the Regiam Majestatem: "Homage is not made to any man for "his *band of maintenance*, but only to the King." (L. 2. c. 65.)

[3] See Co. Litt. 67. a. The tenure of *parage* among the Normans, which seems to have possessed some features in common with that alluded to in the text, required fealty to be done by the Younger to the Elder branch at the sixth, and Homage at the seventh, descent. (Grand Custum. de Norm. c. 30.)

Fee given in Free-Alms, nor for any Tenement given in any way in Marriagehood, as far as concerns the person of the Husband of the Woman to whom the property belongs as her Marriagehood.

CHAP. III.

But Homage may be done to any free person, whether Male or Female, whether of full age or otherwise, whether Clergy or Lay. Yet should it be understood, that if a person has done Homage for a Tenement to a Woman who afterwards marries any man, he shall be compelled to repeat it to her Husband for the same Tenement. But, if any one has by Concord made in Court recovered a Tenement against another who had previously paid a Relief for it to the Chief Lord, it may be questioned, whether the person so recovering the Tenement ought to pay any Relief for it.[1]

CHAP. IV.

Reciprocal, indeed, ought to be the Relation of Fidelity between Dominion and Homage.[2] Nor does

[1] He shall not pay any other Relief, says the Regiam Majestatem. (Vide L. 2. c. 67.)

[2] The mutuality of obligation created by Homage is inculcated, not merely by our own, but other writers. (Vide *Assises de Jerusalem* c. 99. *Coutumes de Beauvoisis* c. 58. *Mirror* c. 4. s. 11. *Bracton* 78. *Fleta L.* 3. c. 16. *Britton fo.* 170. *a.*) This has induced Lord Littleton (3 Hist. Hen. 2. 121.) and Mr. Watkins (Copyholds Vol. 1. p. 2.) to conclude, that the Feudal System was abhorrent from Tyranny, originated in freedom, and ceased to be free only when it was corrupted.

the Tenant owe more to his Lord, in respect of Homage, than the Lord owes to the Tenant on account of Dominion, Reverence alone excepted. Hence, if one person give to another any Land in return for Service and Homage, which is afterwards recovered against the Tenant by a third person, the Lord shall be bound to warrant such Land to him, or to return him an adequate equivalent. It is different, however, with respect to him who holds a Fee of another, as his Inheritance, and, in this character, has done Homage; because although he lose the Land, the Lord shall not be bound to give him an equivalent.[1] In the case we have formerly mentioned, of the death of the Father or Ancestor, leaving an Heir, a Minor, the Lord of the Fee has no right to the Custody of the Heir, or his Inheritance, unless he has first received the Homage of the Heir. But the Homage having been received, the Heir, with his Inheritance, shall continue in the manner before mentioned, in the Custody of his Lord, until he has attained his full age. Having at last arrived at such age, and received restitution of his Inheritance, he shall, by reason of his having been in Custody, be exempt from the payment of any Relief.[2] But a

[1] The Text seems to allude to *Homage auncestrel*, and pointedly to inculcate an opposite doctrine. Yet, Lord Coke refers to this identical chapter of Glanville, in support of the doctrine of Homage Auncestrel!! (Co. Litt. 101. a.) The Reg. Maj. is rather more consistent with itself, but assists us not materially. "But it is otherwise to be understood of him who has Lands as "free Heritage, for the which he is *not* obliged to make Hom-"age: for, although he lose that Land, the over-Lord giver "thereof is not obliged to warrant the same." (L. 2. c. 67.)

[2] Similar is the doctrine of the Grand Norman Custumary c. 33.

Female Heir, whether she has attained her full age, or not, shall remain in the Custody of her Lord, until, with his advice, she is married.[1] If, however, she was within age, when the Lord received her into Custody, then, upon her marriage, the Inheritance shall be discharged from the Relief, so far as respects herself and her Husband.[2] But, if she was of full age at that time, although she continue some time in her Lord's Custody before she is married, her Husband shall pay a Relief. When, however, the Relief has been once paid by the Husband of a Woman, it shall exempt both the Husband and the Wife during their several lives from payment of another Relief, on account of such Inheritance; because, neither the Woman herself, nor her second Husband, if she should espouse a second upon the death of the former, nor her first Husband, should he survive her, shall again pay a Relief for the same Land. But when a Male Heir is left of full age, and known to be the Heir, he shall hold himself in his Inheritance, as

[1] *Si autem fœminæ in Custodia fuerint, cum ad annos nubiles pervenerint, per consilium et licentiam domini sui et consilium et consensum amicorum suorum et consanguineorum propinquorum prout generis nobilitas et feudorum valor requisierint debent maritari, et in contractu matrimonii debet iis feodum custodia liberari.* (Grand Norm. Cust. c. 33.)

[2] Fleta enumerates the instances in which Reliefs were not to be paid. 1. None was payable for a Fief, acquired by any species of purchase. 2. Nor on a change of the Lord. 3. Nor was a Tenant for life only, to pay a Relief. 4. Nor any man who married a woman who had been in custody—but this differs from the Text. 5. Nor any one from whom his Lord had received a remuneration, on account of custody. 6. Nor any one who had once paid a relief for his Estate. (Fleta L. 3. c. 17. s. 5. et seq.)

we have formerly observed, even though his Lord be unwilling, provided he make a Tender to his Lord, as he ought to do, of his Homage, and reasonable Relief,[1] in the presence of creditable persons. A person's Relief is said to be reasonable, with reference to the Custom of the Realm, according to which the Relief of a Knight's Fee is one hundred Shillings,[2] whilst that of Land in Socage is one Year's Value.[3] But as to Baronies[4] nothing certain is enacted,[5] because Barons holding of the King *in Capite* are accustomed to pay their Reliefs to the King, according to his pleasure, and indulgence.[6] The same Rule prevails as to Ser-

[1] Reliefs were in many parts of Normandy certain and fixed: thus a Knight's fee, or, as it is there termed, *feudum loricæ* was five pounds, a barony one hundred pounds, land twelve pence an acre, and woody ground 6d. (Grand Cust. c. 34.)

[2] Now, as a Knight's fee was valued at £20, the sum mentioned in the text was a *fourth* of it.

[3] It appears to have been thus settled by a Law of the Conqueror. (LL. Gul. Conq. c. 40. Ed. Wilkins.) This, as Mr. Watkins observes, seems to have been no more than accounting to the Lord for the profits of that year, for which he might under certain circumstances, have retained the Lands. (Treat. on Copyh. 1. 231.)

[4] Dr. Sullivan accounts for the advantage which the Knights had obtained, when compared to the great Barons, in having their Reliefs reduced to a certainty, from the number of the Knights who made the strength of the Kingdom and were not to be disobliged; and also from the precarious situation many of the great Lords were in, who had been attached to the cause of Stephen. (Lectures p. 109.)

[5] Statutum. "From the word *statutum*," says Dr. Sullivan, commenting upon the Text, "I take it for granted, this change "of Reliefs into money was by Act of Parliament." (Lectures p. 290.)

[6] This was remedied by Magna Carta cap. 2. The Reader may consult Lord Coke's comment on the words *antiquum relevium*,

jeanties.[1] If, however, the Lord will neither receive the Homage nor reasonable Relief of the Heir, then, the latter should safely keep the Relief, and frequently tender it to his Lord, by the hands of respectable persons. If the Lord will by no means receive it, then, the Heir should make complaint of him to the King, or his Justices; and shall have the following Writ.

CHAP. V.

"The King to the Sheriff, Health.[2] Command *N.* "that, justly and without delay, he receive the Hom- "age, and reasonable Relief of *R.* concerning the free "Tenement which he holds, in such a Vill, and that he "claims to hold of him; and, unless he does so, sum- "mon him by good Summoners, that he be before me "or my Justices on such a day, to shew why he has "not done it. And have there the Summoners, and "this Writ. Witness &c."

CHAP. VI.

As to the proceedings which are to be resorted to, in case the Lord should not obey this Summons, and the

where he endeavours to prove, the ancient Relief was certain. (2 Inst. 7. and 8.) Lord Coke, in support of his position, cites a MS. in the Library of Archbishop Parker, which seems almost word for word to coincide with the Laws of the Conqueror. (LL. Gul. Conq. c. 22. 23. 24.) This is the more remarkable, as his Lordship cites from a MS. merely, without describing the nature of it.

[1] Vide Co. Litt. 105. b. and Bracton 84. a.

[2] Vide Co. Litt. 101. a.

means by which he shall be distrained to appear in Court, they may be collected from the former part of this Treatise. When, at last, he appears in Court, he will either acknowledge that the Tenant is the right Heir, or deny that he is the Heir, or he will doubt, whether he is the right Heir or not. If he should acknowledge him to be the Heir, he will, then, either deny that the Tenant has tendered him the Homage and reasonable Relief, or he will admit it. If he confess both the one and the other, he shall either immediately receive the Tenant's Homage and reasonable Relief in Court, or he shall appoint him a fit day for doing it. The same observation may be made, although he deny that the Tenant has proffered to him his Homage or Relief, provided he admit the Tenant to be the Heir. But if in decided terms he denies the Tenant to be the Heir, then, indeed, may the latter, if out of possession, require against his Lord an Assise *de morte Antecessoris sui.* Should the Tenant, however, happen to be in possession, he may hold himself in it, and patiently await, until it pleases his Lord to accept his Homage; because, no one is previously bound to answer his Lord as to the Relief, until the latter has received his Homage for the Fee, on account of which Homage is due to him. But if the Lord doubts, whether the person tendering the Homage be the right Heir or not,[1] being for example unknown to the Lord himself,

[1] Fleta tells us, that an examination ought to precede the Homage, in order to ascertain, whether the person offering himself, was the natural Son of the man to whom he made himself Heir, both with respect to the right of possession, and of pro-

or even to the Vicinage in the character of Heir, then the Lord of the Fee may take the Land into his own hands, and retain it, until the point be fully cleared up, a course of proceeding, which the King generally adopts with respect to all his Barons holding of him *in Capite.*

For, upon the death of a Baron holding of him in chief, the King immediately retains[1] the Barony in his own hands, until the Heir has given security for the Relief, although the Heir should be of full age. But Lords, for a reasonable cause, may sometimes postpone receiving Homage and Relief for their Fees. Suppose, for Example, another person, than the one who asserts himself to be the Heir, should claim a right in the Inheritance. During the pendency of this Suit, Homage ought not to be received, nor a Relief given. Or, if the Lord think that he himself has a right to hold the Inheritance in his own Demesne.

priety &c. &c. that the Lord might not inadvertently be deceived. (L. 3. c. 16. s. 23. 24.)

[1] The Reader will observe the expression, the King *retains*, whilst an inferior Lord *seises or takes*, the fee into his hands. *In manum regis delapsa est* is the expression of Dial. de Scacc. speaking of a fee held in chief, upon the death of its owner. (L. 2. c. 10.) But a passage in Mr. Madox's Hist. of the Exchcq. serves to throw still more light on the text. "Every Honor "originally passed from the King, and, upon every change, by "death, or otherwise, returned to the King again, and remained "in his hand, until he commanded seisin of it to be delivered to "his Homager, according to the custom of noble fiefs." As the Law, by the magic of a fiction, cast the Inheritance on the King the moment his Tenant *in Capite* died, it was merely necessary for him to *retain* it—whilst the Law, not interfering on behalf of an inferior Lord, obliged him to seise the Land.

And if in such case he should, by force of the King's Writ or that of his Justices, implead the person in possession, the Tenant may put himself upon the King's Grand Assise, the form of which proceeding is explained in the second Book, unless in some respects there should be a variation, an Example of which we have in the following Writ for such purpose—

CHAP. VII.

"The King to the Sheriff, Health. Summon, by "good Summoners, four lawful Knights, from the "Neighbourhood of such a Vill, that they be before "me, or my Justices, on a certain day there to elect, "upon their oaths, twelve &c. who better know the "truth of the thing, and will say, for the purpose of "making a Recognition, whether *N.* has greater right "of holding one Hyde of Land in that Vill of *I.* or "whether *R.* of holding it in his Demesne, which the "said *R.* claims by my Writ against the aforesaid *N.* "and of which *N.* who holds the Land, hath put him-"self upon my Assise, and prays a Recognition to be "made, whether he has greater right of holding that "Land in his Demesne or the aforesaid *N.* of holding "it of him: And summon, by good Summoners, the "aforesaid *N.* who holds the Land, that he be then "there to hear that Election. And have there, &c. "Witness, &c."

CHAP. VIII.

But after it has been settled between the Lord and the Heir of the Tenant concerning the giving and receiving of the reasonable Relief, the latter may exact reasonable Aids from his Homagers.[1] This, however, must be done[2] with moderation, keeping in view the extent of their Fees, and the circumstances of the Tenants, least they should be too much oppressed, or lose their Contenement.[3] But nothing certain is fixed, concerning the giving or exacting Aids of this description, unless that the form we have mentioned should

[1] "Aids were, at first, benevolencies of the Vassals, and were "given during the great festivity, or the great necessity of the "Lord upon three occasions—to wit—when his Son was knighted, "when his Daughter was to be married, and when his person "was to be ransomed: but what originally flowed from regard, "Superiors soon changed into a matter of duty, and on a gratui-"ty erected a right." (Dalrymp. on feuds, p. 52.)—Speaking of aids, Mr. Madox informs us, that King William the First took 6s. of each Hyde through England—King Henry the First took 3s. for each Hyde, as aid *pur fille marier*. But he adds, that, for want of requisite notices, he could not speak distinctly of them. (Hist. Exch. c. 15. s. 1.) The Reader may also be referred to *Traites sur les Coutumes Anglo-Norm. par M. Houard.* 1. 265. 518.

[2] By the Norman Code it was fixed at half the Relief paid by the mesne to the Chief Lord. (Grand Cust. c. 35.)

[3] *Contenementum*, a word of frequent recurrence in the old Books and Statutes. "Mr. Selden in his table talk says, that the "word *contenementum* signifies the same with *countenance*, as "used by the country people, when intending to receive a person "with hospitality, they say—*I will see you with the best counte-*"*nance*. So that the meaning of Magna Carta (where this word "occurs) is, a man shall not be so fined, but that he may be able "to give his neighbour good entertainment." (Barr. Anc. Stat. p. 12. See also 4 Bl. Comm. 378.)

be inviolably observed. There are also other cases, in which a Lord can exact from his Homagers similar Aids, observing, however, the principle we have laid down: as if his Son and Heir should be made a Knight, or if he should marry off his Eldest Daughter.[1] But, whether Lords can exact these Aids to maintain their own Wars, is doubtful. The opinion that prevails is, that they cannot by right distrain their Tenants for such purpose, unless so far as the Tenants may feel disposed. But, with respect to the rendering of reasonable Aids, Lords may of right, without the King's precept, or that of his Justices, but by the Judgment of their own Court, distrain their Tenants by such of their chattels as may be found within their Fees, or by their Fees, if necessary; provided the Tenants are dealt with according to the Judgment of the Court, and consistently with the reasonable Custom of it. If, therefore, a Lord may thus distrain his Tenants[2] to render

[1] *Aid* and *relief* do not always appear to be used by the old Books, in different senses. Speaking of the aids, mentioned in the present passage of the text, the Norman Code says, *Hujusmodi relevia in quibusdam feodis dimidio relevio equalia: et in quibusdam feodis decem solidos.* Hence, the ancient custom was to be followed. (Le Grand Cust. de Norm. c. 35.) When Bracton wrote, these aids were considered as matter of grace, rather than of right, being, as he terms them, customs, not services, and personal to the Tenant, not prædial. (36. b.) Judge Blackstone notices the great resemblance, which, in the particular of aids, the Lord and Vassal of the Feudal Law bore to the patron and client of the Roman Law: the patron being entitled to three aids from his client, viz. to marry his Daughter, to pay his Debts, and to redeem his person from captivity. (2 Com. 63.) Generally, see Co. Litt. 76. a. and Mr. Hargrave's note 1. 2 Inst. 231. 232, and Mirror, c. 1. s. 3.

[2] *Homagers.* Bodln. MS.

such reasonable Aids, much stronger is the argument in favor of its being lawful for him to distrain in the same manner for a Relief, as also for any other service necessarily due to him, in respect of the Fee. But if a Lord is unable to compel [1] his Tenant to render his services or Customs, then recourse must be had to the Assistance of the King, or his Chief Justice, and he shall obtain the following Writ—

CHAP. IX.

"The King to the Sheriff, Health.[2] I command "you that you adjudge *N.* that, justly and without "delay, he render to *R.* the Customs and right Serv- "ices which he ought to render him, for the Tenement "that he holds of him, in such a Vill, as can be reason- "ably shewn to be due to him, least he again complains "for want of right. Witness, &c."

CHAP. X.

When the Plea proceeds by virtue of this Writ, the complainant shall, in the County Court, and before the Sheriff, recover his services, whether they consist in

[1] *Justiciare*. *Justiciatio*, says the Norman Code, *est coarctatio super aliquem facta, ut juri pareat*. Having given this definition, it goes on to observe, that it ought not to precede, but follow the offence—that there were three things that authorised it—*transgressio termini prefixi—contemptus justiciæ*, and *irrogatio Injuriæ*. We learn from the same source, that this *Justiciatio* was by distraining the goods, or the Fee, or by taking the body. (Le Grand.Custum. de Norm. c. 6.) [2] F. N. B. 337.

Reliefs or other things, according to the Custom of the County Court. And, if he should prove his right, the Adverse party shall render the reasonable Relief to his Lord, and shall, in addition, be amerced to the Sheriff; it being a general principle, that the Amercement which results from every suit, which has been carried on and determined in the County Court, belongs to the Sheriff. The amount of it, indeed, has been ascertained by no general Assise,[1] but is regulated by the Customs of different Counties; in one County more, in another less.

CHAP. XI.

It follows that we speak concerning Purprestures. A Purpresture, or more properly speaking, a Porpresture,[2] is when any thing is unjustly encroached upon;[3] against the King; as in the Royal Demesnes, or in obstructing public ways, or in turning public waters from

[1] "By the general Assise or Assembly," meaning the Parliament, according to Judge Blackstone. 1. 148.

[2] *Purprestura vel Porprestura*—"And because, it is properly, "when there is a House builded or an Enclosure made of any "part of the King's Demesnes, or of an Highway, or of a com-"mon street, or public water, or such like public thing, it is de-"rived of the French *pourpris*, which signifieth an enclosure." (Co. Litt. 277. b.) The term *purpresture* seems to have been understood by our old Lawyers in three senses. 1st. as committed against the King, by a subject. 2d. as committed by a Tenant, against the Lord of whom he held his fee. 3d. as committed by one neighbour, against another. (Vide Craig. Jus. feud. L. 1. D. 16. c. 10. and L. 3. D. 5. s. 6. 7. Spelm. Gloss. ad voc. Cowell's Interp. Manwood's Forest Laws. p. 169. 176. Grand Norm. Cust. c. 10. &c. &c. and Traites sur les Coutumes Anglo-Norm. par Houard. 1. 387.)

[3] *Occupatur.* "*Occupationes*," says Lord Coke, "are taken

their right course; or when any one has built an Edifice in a City upon the King's Street. And, generally speaking, whenever a Nuisance is committed affecting the King's Lands, or the King's High Way, or a City, the suit concerning it belongs to the King's Crown. But Purprestures of this description are enquired after, either in the King's Chief Court, or before his Justices sent into the different parts of the Kingdom[1] for the purpose of making such Inquisitions, by a Jury of the Place,[2] or Vicinage. And if, by such Jury, a man be convicted of having made any Purpresture of this kind, he shall be amerced to the King to the extent of the whole Fee that he holds of him, and shall restore that which he has encroached upon; and, if convicted of having encroached by building in a City upon the King's Street, the Edifices shall belong to the King; those, at least, which are found to be constructed within the Royal District; and, notwithstanding, he shall be amerced to the King.

"for usurpations upon the king, and, it is properly, when one "usurpeth upon the king, by using of liberties and franchises "which he ought not to have; and, as an unjust Entry upon the "king into Lands or Tenements, is called an intrusion, so an un- "lawful using of franchises or liberties is said an Usurpation: "but *occupationes* in a large sense are taken for purprestures, "intrusions, and usurpations." (2 Inst. 272.) The Reader may also consult Dialog. de Scacc. L. 2. s. 10.

[1] Bracton tells us, that it was, in his time, an Article of the Eyre to inquire, *de purpresturis factis super dominum Regem, sive in ferra, sive in mari, sive in aqua dulci, sive infra libertatem, sive extra.* (116.) See also 2 Inst. 272. 4 Chap. Stat. de Bigamis. Co. Litt. 293. b. 294. a.

[2] *Patriæ.* Vide Spelm. Gloss. ad voc. also 3 Bl. Com. 349. and 375. and Mr. Christian's Note.

An Amercement[1] to the King is, when any one has been so far amerced, by the oaths of lawful Men of the Vicinage, as not to lose any part of his Honorable Contenement.[2] When a person has made a purpresture against any other than the King, he will either have made it against his own Lord, or against another. In the former Case, if the offence come not within the Assise,[3] then, the offender shall be distrained to appear in the Lord's Court, to answer concerning it—I mean, if he holds any other Tenement of the Lord. For this purpose the following Writ shall issue——

CHAP. XII.

"The King to the Sheriff, Health. I command you, "that you compel *N.*, that without delay, he appear

[1] Having already spoken of Amercements, we shall here merely remark that in the reigns of William the Conqueror and his Son Rufus, they were no less immoderate, than oppressive. Henry the First was compelled, by the peculiar difficulties of his situation, to make many concessions.—One of which was, that amercements should no longer be assessed, as they had been in his Father's and Brother's reigns, to the extent of the whole property of the offender, but should be proportionate to the crime—*sicut retro a tempore patris mei et fratris mei in tempore aliorum antecessorum meorum.* (LL. Hen. 1. c. 1.) If these words mean any thing, they imply, that Henry merely restored the Common Law, which his Father and Brother had violated. How ill this concession was observed, we may conjecture, from its having been felt necessary to make it part of the great charter. (See 2 Inst. 27.)

[2] *V. Gul. Somn. Notas ad LL.* 1. *Cap.* 1. *p.* 176. (*Al. MS.*)

[3] *Infra Assisam*—That is, says Skene, within the time within which his Action should be pursued, or else to be holden as prescribed. (Reg. Maj. L. 2. c. 74.)

"in the Court of *I.* his Lord, and there abide by the "right concerning his free Tenement, that he hath "encroached against him, as he says, least, &c. Wit- "ness, &c."

CHAP. XIII.

If the party be convicted of this offence in the Lord's Court, he shall irrecoverably lose the Tenement he holds of such Lord.

But, if he hold no other Tenement of the same Lord, then, the latter shall implead him in the Court of the Chief Lord by a Writ of Right. In like manner, if any one commit an encroachment in this way upon a person, not being his Lord, and the case fall not within the Assise,[1] the matter shall be decided by Writ of Right. But, if the fact happen within the Assise, then, recourse must be had to a Recognition of Novel Disseisin to recover possession, of which proceeding we shall presently speak. In Purprestures of this description, the Boundaries of Land are sometimes destroyed and encroached upon. In such case, upon a complaint being made in Court by any of the Neighbours, let the Sheriff be commanded, that a View of the Boundaries in question be taken in his presence by Lawful Men of the Vicinage, and, upon their oaths, that he cause the boundaries to be as they ought to be,

[1] *Infra Assisam*—lawful time, says Skene, so that the Action of Novel Disseisin is not prescribed. (Reg. Maj. L. 2. c. 74.)

and were accustomed to be in the time of King Henry the First: for this purpose, the following Writ shall issue——

CHAP. XIV.

"The King to the Sheriff, Health.[1] I command "you, that justly and without delay, you make reason- "able divisions[2] between the Land of *R.* in such a "Vill, and the Land of Adam of Byre, as they ought "to be, and were accustomed to be, and as they were "in the time of King Henry, my Grandfather, of "which *R.* complains that Adam, unjustly and with- "out judgment, has encroached more than belongs to "his free Tenement of Byre, least I again hear com- "plaint for want of Justice. Witness, &c."

[1] Vide F. N. B. 285.

[2] Vide Ante p. 133. Note 1.

Book X.

OF THE DEBTS OF THE LAITY ARISING FROM DIFFERENT KINDS OF CONTRACTS, VIZ. FROM SALE, PURCHASE, GIFT, LOAN, BORROWING, LETTING OUT, AND HIRING; AND OF PLEDGES AND GAGES, WHETHER MOVEABLE OR IMMOVEABLE; AND OF CHARTERS CONTAINING DEBTS.

CHAP. I.

Pleas concerning the Debts of the Laity also belong to the King's Crown and Dignity. When, therefore, any one complains to the Court, concerning a Debt that is due to him, and be desirous of drawing the suit to the King's Court, he shall have the following Writ, for making the first Summons——

CHAP. II.

"The King to the Sheriff, Health. Command *N.*, "that justly and without delay, he render to *R.*, one "hundred Marks which he owes him, as he says, and "of which he complains that he has unjustly deforced "him. And, unless he does so, summon him, by good "Summoners, that he be before me or my Justices at

"Westminster in fifteen days from the Pentecost, to "shew wherefore he has not done it. And have there "the Summoners and this Writ. Witness, &c."

CHAP. III.

We have sufficiently explained the course of proceeding to be adopted, in case of the absence of either of the parties, or of default, before the suit is entered upon. We should, however, remark that, it is not usual for the King's Court to compel any one by distraining his Chattels to appear in Court, on account of any suit. In such a Suit, therefore, any one may by the Judgment of the Court be distrained by his Fee, or by attaching his Pledges, as is usually done in other suits. Both parties being present in Court, the Plaintiff may found his demand on a variety of causes. His Debt may arise either upon a Lending,[1] or a Sale, or a Borrowing, or a Letting out, or a Deposit, or from some other just cause inducing a Debt.

A Debt of the first description arises, when one person entrusts another with any such thing as consists in Number, or Weight, or Measure.[2] When one person so entrusts another, if he should receive back more

[1] The Terms *mutui*, *venditionis*, *commodato*, *locato*, *deposito*, are evidently borrowed from the Civil Law. But we are not from hence to conclude, as Bishop Nicholson hastily did, that Glanville *apes*, as he expresses it, the Roman Code. (Scotch Historical Library, 255.) This, of all faults, is the least imputable to the venerable Glanville.—On the term *mutuum* see Note 1. p. 204. Infra.

[2] Vide Justin. Instit. L. 3. tit. 15.

than he lent, he commits Usury; and, if he die in such Crime, he shall, by the Law of the Land, be punished as a Usurer, of which, indeed, we have spoken more fully in the preceding pages.[1] But when any thing is entrusted to another, it is, generally, confided upon the giving of Pledges:[2] sometimes, indeed, upon the putting things in Pledge: sometimes, under a solemn promise; sometimes upon the Exposition of a Charter: and at other times upon the conjoined strength of many of these Securities. When, therefore, any Debt is secured upon the giving of Pledges alone, if the principal Debtor should be so much reduced as to be incapable of discharging it, then, recourse must be had to the Pledges; and they shall be summoned by the following Writ——

CHAP. IV.

"The King to the Sheriff, Health. Command *N.*, "that justly and without delay, he acquit *R.* of the

[1] L. 7. c. 16.

[2] The Norman Code divides Pledges into, *simplices*, and *debiti retinentes*. An example of the former kind is the following—*Ego plegio A. quod reddat B. decem solidos.* The effect of such a pledge was, that it ceased with the life of the person entering into it, and descended not upon his Heirs. Neither was there any difference, in this respect, if the pledge was given for the appearance of another in any suit. With respect to the *latter* kind of pledge, the Term was employed, when the person entering into it made himself answerable for the Debt, and thus stood in the twofold capacity of Debtor and pledge. The effect of this seems to have been, to release the original Debtor, and to render the Representatives of the person entering into it liable to answer it. (Le Grand Custum. de Norm. c. 60. 89. 90.)

"Hundred Marks against *N.*, for which he became his "surety, as he says, and of which he complains he has "not acquitted him. And, unless he does so, summon "him, by good Summoners, &c."

CHAP. V.

When the Pledges appear in Court, they will either confess their Suretyship, or they will deny it. Should they adopt the former course, they are then bound[1] to satisfy the Creditor, at a convenient time appointed in Court for such purpose; or they are bound in a legal manner to prove, that they are discharged from such suretyship by payment, or by some other lawful means. But, if there are many Pledges, each of them is answerable for the whole Debt, unless it was otherwise stipulated when they became Sureties; and they are all to be distrained to satisfy the Debt.

Hence, if there were many Sureties, and one or more of them prove incapable of answering the engagement, the burthen of the Debt shall fall upon the others, either entirely, or to the extent of the Deficiency. But if, in becoming sureties for a person indebted, the Pledges assumed the responsibility of certain parts

[1] The same Rule is laid down in the Norman Code: but the subject is there treated far more diffusely. It seems, by that Code, to have been an obligation imposed upon the Homager, by his tenure, to become pledge for his Lord's Debts to the extent of a year's Rent—to become pledge for his person, if in prison—for his prosecuting a suit, or appearing to it, &c. &c. (Grand Custum. c. 60.)

only, whatever may happen as to some of the Pledges, the others shall not be compelled to answer, except for their own proportion. From this it is evident that a dispute may sometimes arise between the Creditor and the Pledges—sometimes between the Pledges themselves, if any one of them should allege that he had become the surety of the principal Debtor for a less sum, whilst, on the other hand, it is asserted that he became so for a greater. For when the Pledges are individually bound for certain parts, it follows of necessity, that the Creditor himself must sue the one, who confesses to owe less upon his undertaking than he ought. But, should some of them become Pledges for the whole, some for certain parts, then, indeed, it will be requisite, that those who have become sureties for the whole should sue those who will only confess themselves indebted in a less sum than they really owe. How these different points are to be proved, will be seen in the sequel. The Sureties, having discharged the Debt, may have recourse to the principal Debtor, should he afterwards acquire sufficient to repay them; and this by an original Action of Debt, of which we shall presently speak. It should, however, be observed, that if a Man has become a Pledge for another's appearance, and he should, in consequence of the default of his Principal, happen to be amerced, and in respect of it pay any sum, he cannot afterwards on this account recover any thing against him for whom he became Surety.[1] Whoever, indeed, has become a Pledge for

[1] The Regiam Majestatem, on the contrary, lays it down, that

another's appearance in any suit that belongs to the King's Crown, as, concerning the breaking of the King's peace, or otherwise, if he do not produce his Principal, he shall, as a consequence of his suretyship, be amerced to the King, of the nature of which we spoke on a former occasion. But the effect of this will be to liberate him from his suretyship.

Should, however, the Pledges deny in Court their Suretyship, then, if there were many Pledges, either all of them will deny such suretyship, or some will admit, and some deny it. But, if some admit, and some deny it, then, there may be a Suit, as well between the Creditor himself and the Pledges, as between those Pledges who confess, and those who deny their engagement, according to what we have previously observed.

But, what shall be the proof required of those, between whom the suit is to be conducted, is a question? Whether, for example, it should be made by the Duel, or by any other mode; or whether the Pledges can, by the oaths of such a number of men as the Court may require, deny their undertaking? With respect to this point, some persons assert, that the Creditor himself, by his own oath and that of lawful Witnesses, can by Law prove it against the Pledges, unless the Pledges will prevent him from the oath; and this may now be done when the Demandant appears prepared

he can recover, (L. 3. c. 1.)—a rule that is certainly more consistent with Justice. On the other hand, the Mirror coincides with the text. (c. 2. s. 24.)

to take the oath, though formerly it ought to have been done before the Law was waged.

Thus in such case the Duel may be resorted to.

CHAP. VI.

A Loan[1] is sometimes made, upon the Credit of a putting in Pledge. When a Loan of this description takes place, sometimes moveables, as Chattels, are put in pledge: sometimes immoveables, as Lands and Tenements, and Rents, whether consisting in Money, or in other things. When a Compact is made between a Creditor and Debtor, concerning the putting any thing in pledge, then, whatever be the mode of pledging, the Debtor upon his receiving the thing lent to him, either immediately delivers possession of the Pledge to the Creditor, or not. Sometimes also a thing is pledged for a certain period, sometimes indefinitely.

Again, sometimes, a thing is pledged as a Mortgage, sometimes not. A pledge is designated by the Term Mortgage,[2] when the fruits and Rents, which are

[1] *Mutuum—quia, ita a me tibi datur, ut ex meo tuum fiat.* (Justin. Instit. L. 3. t. 15.) *Vinnius* terms this *bella allusio, non vera vocis originatio.* Dr. Wood observes, as to the Term itself, it hath no one particular name in the English language.

[2] With this explanation the *Regiam Majestatem* (L. 3. c. 2.) and the *Grand Norman Custumary* (c. 113.) literally coincide—though it differs from that given by Littleton, and followed by Coke, Craig, and Blackstone. (Co. Litt. 205. a. 2 Comm. Bl. 157. Craig. Jus Feud. L. 2. D. 6. s. 27.) What is the more remarkable, Lord Coke expressly contrasts the *mortuum vadium* to the *vivum*

received in the interval, in no measure tend to reduce the demand for which the pledge has been given.

When, therefore, moveables are put in pledge, so that possession be delivered to the Creditor for a certain period, he is bound to keep the pledge safely, and neither to use it, nor in any other manner employ it, so as to render it of less Value. But should it, whilst in Custody and within the Term, suffer deterioration, by the fault of the creditor, a Computation shall be made to the extent of the detriment, and deducted from the Debt. But, if the thing be of such a description that it necessarily requires some expence and cost, for Example, that it might be fed or repaired, then the stipulation of the parties on that subject shall be abided by. In addition—when a thing is pledged for a definite period, it is either agreed between the Creditor and Debtor, that if, at the time appointed, the Debtor should not redeem his pledge, it should then belong to the Creditor so that he might dispose of it as his own; or no such agreement is entered into between them. In the former case, the Agreement must be adhered to; in the latter, the Term being unexpired[1] without the Debtor's discharging the Debt, the

vadium. Vivum autem dicitur vadium quia nonquam moritur ex aliquâ parte quod ex suis proventibus acquiratur. But assuredly, if the term mortgage is to be collected from its forcible contrast to these words, Glanville's explanation is infinitely preferable to that given by Lord Coke.

[1] *Existente termino.* This is a palpably false reading—it should be, *elapso termino*, the term being expired, an expression familiar to Glanville. This suggestion is sanctioned by the Reg. Maj. '*the day being bygone.*' (L. 8. c. 8.)—by the expression of the text

Creditor may complain of him, and the Debtor shall be compelled to appear in Court, and answer by the following Writ.

CHAP. VII.

"The King to the Sheriff, Health. Command *N*, "that justly and without delay, he redeem such a thing "which he has pledged to *R*, for a hundred Marks, for "a Term which is past, as he says, and of which he "complains that he has not redeemed it; and, unless "he does so, &c."

CHAP. VIII.[1]

In what manner the Debtor shall be distrained to appear in Court, whether by the Pledge itself, or by another mode, is doubtful. But that may be left to the discretion of the Court, as the matter can be sufficiently expedited which-ever mode is resorted to. It is, however, sometimes requisite that he should be

ad terminum in the sentence immediately preceding—by the words of the Writ in the next chapter, '*a term which is past*'—and, lastly, by a passage in the Eighth Chapter of this Book, where our Author expressly lays it down, that, before the time fixed for payment, the Creditor cannot claim the Debt. Yet is the reading *existente termino* preserved in Mr. Houard's Edition of Glanville, an Edition frequently, but not always, more correct than any of those printed in this Country.

[1] Sir Edward Coke, having been led by his subject to treat of *conditions*, refers to the present Chapter of our Author. From such plain and simple materials did the complicated doctrine of conditions draw its primary principles ! ! (Co. Litt. 201. b.)

present in Court, before the thing in question be adjudged absolutely to the Creditor; since, were he present, he might alledge some reason, why the thing should not irrevocably belong to the Creditor. But when the Debtor appear in Court, he will either confess, that he pledged the thing in question for the Debt, or he will deny it. If he confess it, as he has in so doing confessed the Debt, he shall be commanded at a reasonable period to redeem his pledge; and, unless he should comply, liberty shall be given to the Creditor, from that time, to treat the pledge as his own property, and do whatever he chuses with it. Should the Debtor, however, deny it, he will then either acknowledge that the thing is his property, but that for some cause it happened to be out of his possession, and to have got into the hands of the other, as a Loan, or as being intrusted to him for Custody or from some other cause of this nature; or he will confess in Court, that the thing is not his property, which if he should do, liberty shall immediately be conceded to the Creditor, to dispose of the thing in question, as his own. But, if he alledge that the thing is his property, but denies as well the pledge as the Debt; then, the Creditor shall be obliged to prove against him, that he intrusted the other to the extent of the present demand, and that the Debtor in return pledged to him the specific object in dispute. The nature of this proof may be collected from what we formerly laid down, in treating of Pledges who deny their suretyship. But, previous to the period fixed for the payment, the

Debt cannot be demanded; although, if a thing be pledged indefinitely, and without any period being fixed, the Creditor may, at any time he chuses, demand the Debt. The Debt being discharged by the person owing it, the Creditor is bound to restore to him the thing pledged, without its having suffered any deterioration; nor, if the thing should by any accident be lost or injured whilst in his Custody, is the Creditor from that circumstance liberated from the Debtor's claim; because he is decidedly bound, either to restore the thing pledged or to make satisfaction for it, or to lose his Debt. When a Compact is entered into between a Debtor and Creditor, concerning the pledging of a particular thing, if the Debtor, after having received the Loan, should not deliver the pledge,[1] it may be asked, what step should the Creditor have recourse to in such a case, especially as the same thing may be pledged to many other Creditors, both previously and subsequently? Upon this subject, it should be remarked, that the King's Court is not in the habit of giving protection to or warranting private Agreements of this description, concerning the giving or accepting things in pledge, or others of this kind, made out of

[1] "In Glanville's time," says Sir Wm. Blackstone, "when the "universal method of conveyance was by livery of seisin, or "corporeal tradition of the Lands, no gage or pledge of Lands "was good, unless possession was also delivered to the Creditor" —and, having referred to this part of our Author, he observes, "And the frauds which have arisen, since the exchange of these "public and notorious conveyances for more private and secret "bargains, have well evinced the wisdom of our ancient Law." (2 Bl. Com. 159.)

Court, or even in any other Court than that of the King. If, therefore, such Compacts are not observed, the King's Court does not interfere: and hence it is not bound to answer concerning the right of different Creditors, as prior or subsequent, or respecting their privileges. But, when an immoveable thing is put into pledge, and Seisin of it has been delivered to the Creditor for a definite term, it has either been agreed between the Creditor and Debtor, that the proceeds and rents shall in the mean time reduce the Debt, or that they shall in no measure be so applied. The former Agreement is just and binding: the other, unjust and dishonest, and is that called a Mortgage, but this is not prohibited by the King's Court, although it considers such a pledge as a species of Usury.[1] Hence, if any one die having such pledge, and this be proved after his death, his property shall be disposed of no otherwise than as the Effects of a Usurer.

[1] This may be accounted for by recollecting that Usury itself, though viewed in a criminal light, was not expressly prohibited. (Ante L. 7. c. 16.) Nor was it punished, if the party amended: but, if he died in the crime, the act had then reached the point of criminality—the offence was complete, and the punishment followed. But, until that moment arrived, Usury, in strictness, was an act rather approaching to a crime, than actually amounting to it. The reasoning was founded upon principles no less artificial than false—the death of the party being purely accidental, and the crime itself being complete, without any reference to such accident, the very instant the party received the usurious remuneration. The doctrine of the Regiam Majestatem, in unison with this reasoning, and contrary to the text of Glanville, expressly forbids a Mortgage, because it was a species of Usury. (c. 5. L. 3.)

The Reader will meet with some curious disquisitions in the Dial. de Scacc. (L. 2. s. 10.) where he will find the doctrine of the text illustrated in the true spirit of the times.

In other respects, the same Rules should be observed, as in pledges of moveables, concerning which we have already spoken. But, it must be remarked, that if, after any one has paid his Debt, or has in a proper manner tendered it, the Creditor should maliciously detain the pledge, the Debtor upon complaining to the Court shall have the following Writ——

CHAP. IX.

"The King to the Sheriff, Health. Command *N.* "that justly and without delay, he render to *R.* the "whole Lands, or such Lands, in such a Vill, which "he has pledged to him for a Hundred Marks for a "term which is past, as he says, and has received his "Money, or which he has redeemed, as he says; and, "unless he does so Summon him by good &c."

CHAP. X.

Upon the Creditor's appearing in Court, being summoned for this purpose, he will either acknowledge the Land in question, as his pledge, or he will say, he holds such Land, as his Fee. In the former case, he ought either to return the pledge, or shew to the Court some reasonable cause, why he should not be compelled to do so. In the latter case, it shall, upon the prayer either of the Creditor or Debtor, be put upon a Recognition of the County, whether the Cred-

itor holds the Land in question, as his Fee, or his Pledge; or whether his Father, or any other of his Ancestors, was seised of it, as in Fee or in Pledge, on the day of his death; and, so it may be objected to him who seeks the Land upon the seisin of his Father.

Thus the Recognition upon this subject may be infinitely varied, to correspond with the Claim and the Defence. But, if the Recognition be not prayed by either party, the Plea may proceed in Court upon the Right.

CHAP. XI.

If the Creditor lose his Seisin, either by means of the Debtor, or any other person, he cannot recover it through the assistance of the Court; not even by a Recognition of Novel Disseisin.

For if he was unjustly and without a judgment disseised of his pledge, by any other person than the Debtor himself, the Debtor may have an Assise of Novel Disseisin. If, however, the Creditor was disseised by the Debtor himself, the Court will not assist him against the Debtor, in recovering his pledge, or in giving him a Re-entry, unless through the Debtor himself; for the Creditor should resort to an original Plea of Debt, in order that the Debtor may be compelled to render him satisfaction for his Debt. In such case, the Debtor shall be summoned by the foregoing Writ of first summons.

CHAP. XII.

[1] Upon the Debtor's appearing on the day appointed in Court, if the Creditor has neither Pledge, nor Sureties, nor any other proof, unless the mere faith of the other, this will not be received as any proof in the King's Court. Yet, he may proceed for the breach or violation of faith in the Court Christian. But, though the Ecclesiastical Judge can hold cognizance of such crime, and either impose penance on the convicted party, or enjoin him to make satisfaction, yet, with respect to Pleas concerning the Debts of the Laity, or affecting Tenements, the Court Christian cannot by a Law of the Realm hold or decide them, under the pretence of the party having pledged his promise.[2] The Creditor ought, therefore, to adduce other proof, if the Debtor deny the Debt in question.

For if he admit it, then, he is bound to discharge it, in manner similar to that we have already explained, in speaking of Pledges, confessing their suretyship.[3] Should he, however, deny it, the Creditor may prove

[1] Vide LL. Gul. Norman. c. 28. (Al. MS.) The Law here alluded to, the Reader has already been put in possession of. See p. 170. note 1.

[2] Vide Constitutions of Clarendon. (Anglo-Sax. LL. Ed. Wilkins. 324.)

[3] The Text is not free from difficulty which evidently arises from an omission. I have ventured to introduce the words, "*should he, however, deny it, the Creditor.*" The Context countenances this conjecture.

his demand, either by a proper Witness, or by the Duel, or by a Charter. When, therefore, any one offer in Court, as proof of the Debt, the Charter of his Adversary, or his Ancestor, the Defendant will either admit such Charter, or deny it. In the latter case, he may deny or controvert it in two ways: thus, he may acknowledge in Court the seal to be his own, but deny that the Charter was made either by him, or with his consent, or that of his Ancestor; or he may absolutely deny, both the Seal and the Charter. In the first case, when he has publicly in court acknowledged the Seal to be his own, he is bound to warrant the terms of the Charter, and, in all respects, to observe the compact expressed in the Charter as contained in it, without question, and to impute it to his own indiscretion, if he incur any loss by negligently preserving his own Seal. But in the latter case, the Charter may be proved in Court by the Duel by any proper Witness, especially if his name be inserted in the Charter itself. There is another mode by which the Credit of a Charter is accustomed to be established in Court, namely, by some certain and unquestionable signs. As, for Example, by other Charters, impressed with the same Seal, and concerning which it is clear, that they are the Charters of the party, who denies the present Charter, because he has openly warranted them in Court. If in such case the impressions coincide in every respect with one another, so that there is no suspicion of any difference between the Seals, it is usual to consider the fact as proved; and, whether

by this, or by any other legal mode, the party should be overcome, he shall lose his suit on the occasion, whether it be a Plea of Debt, or concerning Land, or any other thing whatever; and he shall, in addition, be amerced to the King. For, it is a general Rule, that whenever a person has said any thing in Court or in a Plea which he afterwards denies, or of which he has neither suit, nor Warrantor, nor sufficient proof,[1] or has been distrained to assert the contrary, or to deny it by sufficient proof, he shall be amerced to the King. But, if the person, against whom the Charter is produced to prove a certain Debt, acknowledge it from the first, then he shall be compelled to satisfy the Creditor, according to the tenor of the Charter. When any thing is lent on the joint strength of many of the proceeding securities, then, from the moment the Debtor makes default, he is liable to be distrained by all the securities being put in force against him at the same time. It is on this account, therefore, that many securities are taken, that in case of the inability of the Debtor, the Creditor may more readily be satisfied, than if there exist but one security only.

CHAP. XIII.

A Debt sometimes arises when a thing is borrowed;[2] as if I lend a thing to you gratuitously, to be made

[1] A similar Law is to be found amongst those ascribed to the Conqueror. (LL. Gul. Conq. c. 28.)

[2] *Commodatum.* (Justin. Inst. 3. 15. 2.) A *Commodatum* differed from a *mutuum*, because the same person continued to be

use of in your service. The service being finished, you are bound to restore my property to me, without deterioration,[1] if it be in existence.

But, if the thing itself be destroyed, or has by any means been lost, whilst in your Custody, you are absolutely bound to return me a reasonable price. But by what, or whose proof,[2] it is to be shewn—or if any one has lent his property to be used in a certain place, or for a certain Term, and he who thus received it has used it, either in another place, or at another time, the extent to which he ought to make a recompense, or upon what proof, or whose property it is to be adjudged, are points that may be questioned. The party, indeed, shall be absolutely excused from the imputation of Theft, by reason that his possession of the thing detained originated through the owner of the property.

It may also be doubted, whether the Owner can recall his property so lent to another, within the time or place allotted, especially if he himself should have occasion to use it in the interval.[3]

the owner, and because the same thing was to be returned, and not another of the same quantity or quality, as in a *mutuum*. (Dig. 13. 6. 8. and 9.) "They have different names in Latin, though "not in English," says Dr. Wood. (Civil Law. Inst.) To avoid the inconvenience and confusion of employing the same term for each, the Translator has called the one a loan, the other a borrowing. The distinction between a gratuitous loan for use, and a simple loan, occurs in the Code Napoleon, which is drawn, as, indeed, may be observed of no small portion of that work, from the Civil Law.

[1] Skene refers to Exodus c. 22. v. 14. 15.

[2] "By him who gave the Loan, and by his Witness," says the Regiam Majestatem. (L. 3. c. 9.)

[3] "It is answered, he may not repeat it or seek it again, be-

CHAP. XIV.[1]

A DEBT also arises by reason of a Purchase and Sale. When any person sells a thing to another, the price is due to the Vendor, and the thing contracted for to the Purchaser.[2]

But a purchase and sale are effectually perfected from the moment the price is settled between the contracting parties; provided possession of the thing purchased and sold be delivered,[3] or that the price, either wholly, or in part, be paid, or, at least, that Earnest[4] be given and received.[5]

"cause any loan may not be repeated or called back again, until "the use be perfected and fulfilled to the which it was lent." (Reg. Maj. L. 3. c. 9.) But the modern French Code permits it to be recalled. (S. 1889.)

[1] Vide Bracton fo. 61. b. and Fleta L. 2. c. 58.

[2] Vide Justin. Inst. 3. 24. §. Custum. de Norm. c. 22. and Bracton 61. b. The two chief obligations of the Vendor, as laid down in the present and following chapters, are comprised in a section of the modern French Code—that of delivering, and that of warranting the thing which he sells. (Code Napoleon 1603.)

[3] *Quia sine traditione non transferuntur rerum dominia.* (Bracton 61. b.)

[4] Arrhæ. In the Civil Law the *Arrha* or Earnest was given, either simply as a symbol, or mark of the Contract, or, it was given, as Vinnius informs us, as a part of the price. In the former case the purchaser was not permitted to avoid the contract with the loss of his Earnest—in the latter, he was allowed to do so. The Vendor might recede with the loss of twice the value of it. (Dig. 18. 1. 35.—19. 1. 11. 6. Inst. 3. 24. pr.) With respect to the effect of *Earnest*, as our Law now stands, vide 2. Bl. Comm. 447.

[5] When there is neither writing, Earnest, nor delivery, the parties, says Bracton, may retract. (61. b.)

But, in the two former cases, neither of the Contracting parties can by any means at his own option recede from the Agreement, unless for some just and reasonable cause ; as, if the terms of the contract were, that either of the parties may with impunity retract within a certain period ; then, indeed, either party may within the period prescribed avail himself of the terms of the Contract and recede, without being liable to any penalty : since it is, generally speaking, unquestionable that, *Conventio legem vincit.*[1] Besides, if the Vendor sold the thing to the Purchaser as being sound and without fault,[2] and the Purchaser can afterwards satisfactorily shew, that the thing at the time of the contract was not sound, but faulty, then, indeed, the Vendor shall be compelled to take back his property. But it is sufficient, if the thing was in a proper state, at the time of the Contract, whatever may afterwards happen to it. But I doubt, as to the period within which this should be proved, or complaint made concerning it, especially where there is no special Agreement. Where, however, Earnest only has been given, if the Purchaser would recede from the Contract, he may do so, with the loss of the Earnest. But if, in such case, the Vendor would retract, it is a question whether he

[1] *Pactum enim legem vincit.* (LL. Hen. 1. c. 49.) "Contracts "legally made have the force of Law between those who have "made them." (Code Napoleon s. 1134.)

[2] If, says a Law of Ina, a person has purchased any thing, and, within thirty days, discover it to be defective, he may restore the thing to the hands of the Vendor, unless the latter will swear, that he knew of no defect in it at the time he sold it. (LL. Inæ. c. 56.)

can do so without incurring a penalty.[1] It does not seem that he can; because he would then be in a better situation than the Purchaser. But, if it cannot be done with impunity, what punishment shall such conduct incur?[2] The risk of the thing sold and purchased generally belongs to the person who has possession of it,[3] unless it has been differently arranged.

CHAP. XV.

THE Vendor and his Heirs are bound to warrant the thing sold to the purchaser and his Heirs, if the thing be an immoveable; and hence, the Purchaser[4] and his Heirs may be sued in the manner we have formerly explained, in treating of Warranties.

If any person sue the Purchaser with respect to a moveable, on the ground that the thing in question was first sold or given to him, or from any other just cause was acquired, unconnected with the imputation of Felony, the same rule may be laid down as that we have mentioned concerning immoveables. But if, under

[1] In Bracton's time the Vendor forfeited double the Earnest—a rule according with that of the Roman code. (Bracton 62. a.)

[2] "*Double the Earnest*" was to be forfeited by him according to the Reg. Maj. (L. 3. c. 10.)

[3] *Quia re vera qui rem emptori nondum tradidit adhuc ipse dominus erit.* Hence—*Si post emptionem ante traditionem fundo vendito aliquid per alluvionem vel alio modo accrevit quod commodum ad venditorem pertinebit.* (Bracton 62. a.)

[4] *Emptor*, a palpably false reading, as the context proves: it should be *venditor*, the vendor. See Bracton 62. a.

an imputation of Theft,[1] the Purchaser is sued for the thing, he is bound in the clearest manner to remove from himself every such an imputation, or to call a Warrantor.[2] If, therefore, he adopt the latter course, he will name either a certain Warrantor, or an uncertain one. If he call a certain Warrantor to Court, alleging that he desires to have him to Warrant at a reasonable period, then a day is to be given him in Court for that purpose.

And, if the person called to Warrant appear on that day, and warrant in Court, both the sale and the thing sold to the Purchaser, then, the latter shall be entirely discharged, and that so effectually, that he shall not afterwards sustain any loss. But, if he should fail in entering into the Warranty, then, the Plea shall proceed between the Purchaser and his Warrantor; and thus may it come to the Duel. But, it may be asked, can the Warrantor call another Warrantor into Court? If that be permitted, at what Warrantor must it stop?[3] It should be added, that when any one has so named

[1] Vide Bracton 150. b. et seq.

[2] Vide Mirror c. 3. s. 13. Bracton 151. b. Fleta 55. s. 8. We find that Warrantors were sometimes collusively vouched.

Thus, Champions of acknowledged prowess were named, who, being hired for the purpose, readily entered into the Warranty. When such an instance of collusion took place, the Champion was, according to *Bracton* and *Fleta*, to lose a foot and a hand—but, in *Britton's* time, the Champion and the person citing him were both liable to death.

[3] The Bodleian and Harleian MSS. say the *fourth*, omitting the mark of interrogation at the end, and leaving the sentence an absolute assertion; which most probably is the true reading, as it corresponds with the *Regiam Majestatem.* (L. 3. c. 13.)

a Warrantor of a thing which is sued for as stolen, the Warrantor is usually attached by virtue of the following Writ, directed to the Sheriff:—

CHAP. XVI.

"The King to the Sheriff, Health. I command "you, that justly and without delay, you cause *N.* to "be attached, by safe and secure Pledges, that he be "before me, or my Justices, on a certain day, to war- "rant *R.* such a thing which *H.* claims against *R.* as "stolen, and of which the aforesaid *R.* has drawn him "to warrant in my Court; or to shew wherefore, he "ought not to warrant to him. And have there the "Summoners and this Writ, &c."

CHAP. XVII.

But, if the Purchaser should call an uncertain Warrantor, in such case, if he have sufficient proof of its being a lawful purchase, that shall discharge him from the Felony.[1] Yet it shall not protect him from the

[1] No Man, says a Law of the Confessor, shall purchase any thing without the City gate, but shall have the testimony of the Prefect of the City, or of some other respectable person, who can be confided in. (LL. Ed. Conf. 1.) A Law of his predecessor Æthelstan is nearly in the same words, except that it tacitly permits purchases without the City Gate, if they did not exceed twenty *denarios*. (LL. Æthelst. 12.) Some of the Laws of

loss, I mean, of the thing in question. But, if upon this point he has not a sufficient suit, he is in danger.

Debts arising either from a purchase or a borrowing are usually substantiated by the general mode of proof in Court; in other words, either by a Writing, or by Duel.

CHAP. XVIII.

A DEBT sometimes arises from a Letting out and a Hiring:[1] as when any one lets out a thing to another for a certain period, in consideration of receiving a certain reward. In such case, the former is bound to concede the use of the thing, and the latter to pay the price. But, it should be observed, upon the expiration of the term stipulated, the former may lawfully and of his own authority resume possession of his property.[2] But, if the person engaging to hire the thing should not pay the price at the appointed time, it may be asked, whether the other party can in such case forcibly resume possession by his own authority?

But we briefly pass over the foregoing Contracts, arising as they do from the consent of private individ-

Edgar are admirably adapted to effect the same object, (LL. Sup. Eadg.) which appears to be constantly kept in view by the different Legislators, who preceded Henry the Second.

[1] *Ex locato* and *ex conducto*. "*Locatio conductio*," says Dr. Wood, "is one word." *Locator* is he that lets out to hire, *conductor* he that hires. (Justin. Inst. 3. 25. pr.)

[2] *Si etiam vacuam invenerit et non obligatam.* (Bracton 62. b.)

uals; because, as it has already been observed, the King's Court does not usually take cognizance of them; nor, indeed, with such Contracts, as may be considered in the light of private Agreements, does the King's Court intermeddle.

Book XI.

OF ATTORNIES, WHO ARE PUT IN THE PLACE OF THEIR PRINCIPALS IN COURT, TO GAIN OR LOSE FOR THEM.

CHAP. I.

The Suits discussed in the former part of this Treatise concern the Right and Propriety of the thing, which a person may prosecute, as indeed, some other Civil Pleas, as well by himself, as by an Attorney[1] put in his place to gain or lose. But the person, who thus puts another in his place, ought to be present[2] in Court.

It is usually done in the presence of the King's Jus-

[1] *Responsalis.* From some expressions made use of by Bracton and Fleta, it has been conjectured, that an Attorney, an Essoiner, and a *Responsalis*, differed in some respects. (Bracton 212. b. and Fleta, L. 6. c. 11. s. 6. 7.) Of this opinion Lord Coke seems to be. (Co. Litt. 128. a.) Yet, we must be cautious, in applying these distinctions to Glanville; for they may, after all, be the result of a much more recent period. Nor is the reading of Bracton, in the passage alluded to, perfectly free from suspicion.

[2] Sir Edward Coke ascribes this rule to "the policy of the "Common Law, that suits might not increase and multiply." (2 Inst. 249.) Whilst the Mirror lays it down generally, that it is an abuse to answer or appear by Attorney. (Mirror, c. 5. s. 1.)

tices of the Common Pleas. But on no account, otherwise than as having been appointed by his Principal, when present in Court, ought any one to be received as an Attorney.[1] It is not requisite, that the adverse party should on that account be present in Court;[2] nor, indeed, the person who is so put in the place of the other, if he be known to the Court. One person alone may be put in the place of another; or two or more, either collectively or separately; so that, if one of them is unable to attend, the other or others may follow up the Plea. Through the medium of such an Attorney, a Plea may be commenced in Court, and determined, whether by Judgment, or final Concord; and that, as fully and effectually, as by the Principal himself.

But, it should be understood that, it will not suffice

[1] Mr. Madox, in treating of the *Exchequer*, informs us, that "in general, accomptants were obliged to come in person to "render their accounts. If they made an Attorney to account "for them, it was usual to have the King's leave for it. Some-"times, the accomptant nominated his Attorney before the "King: and thereupon the King by his Writ commanded the "Treasurer and Barons to admit such person, as Attorney, ac-"cordingly. But sometimes, especially towards the latter part "of the second period, the Accomptant's Attorney was admitted "by warrant or leave of the Treasurer, Chancellor of the Ex-"chequer, or Barons, or one of them." (Madox's Exchеq. c. 23. s. 5.) Supposing there was a certain uniformity of proceeding observed in the superior Courts, this extract may furnish us with an idea of the gradual deviations from the strict rule of our text.

[2] The Norman Code lays down a contrary doctrine, asserting that it was not lawful to constitute any Attorney in the absence of the party, unless in the presence of the Prince, whose testimony alone sufficed to make a Record. (Grand. Cust. c. 65.)

for any one to constitute another his Bailiff [1] or Steward [2] for the managing his Lands and affairs, even if it be made to appear to the Court, in order that he should be received in Court in any Suit in the place of his Principal.[3] But, it is necessary that, a special authority should be delegated for this purpose; and that the Attorney should, in the manner before described, be put in his place, expressly in that particular Action, to lose or gain for him.

It should also be observed, that any one may in the King's Court put another in his place, to gain or lose

[1] *Ballivum.* It is the opinion of Sir Henry Spelman, that we received the term from the Normans. There is, indeed, frequent mention of such an officer in the Grand Custumary. (c. 4. &c.) But Lord Coke thinks, we received it from the Saxons. It occurs in a law of Edward the Confessor, if it be not an interpolation of a later age. (Ed. Conf. LL. c. 35.) It has been received in a variety of significations—As meaning a Judge, an Officer of the Crown, a Bailiff of a hundred, of a Liberty, and of a Borough, of a Manor and of an Estate. (Spelm. Gloss. ad voc.) Cowell, who deduces the word from the French, thinks our Sheriffs were formerly called Bailiffs, as their Counties are termed Bailiwicks. (Cowell ad voc.) See Fleta L. 2.

[2] *Seneschallum*—"Is, says Cowell, a French word, but bor-" rowed from Germany, being, as *Tilius* saith, compounded of " *Schal*, i. e. *servus aut officialis*, and *gesnid*, i. e. *familia*. We " english it Steward." (Cowell's Interp. ad voc. Seneshall. See also Madox's Exchcq. c. 2. s. 6. "It is derived," says Lord Coke, " of *Sein* a house or place and *schalc* an officer or governor, &c." (Vide Co. Litt. 61. a. for other derivations.) See Fleta L. 2.

[3] Yet, from the form of the writ which our Author gives us, L. 13. c. 13. it seems perfectly clear, that a Bailiff was allowed to hear a Recognition for his principal. The reason of the distinction, perhaps, might be found in the different nature of the functions—to perform the duty of an Attorney being an active, that of merely hearing a Recognition, of a passive nature—the one, requiring skill—the other, not.

for him, even in a suit that he has in another Court; and it shall be commanded, that the Attorney shall be received in such Court in the place of his Principal, by the following Writ——

CHAP. II.

"The King to the Sheriff, or to any other presiding "in his Court, Health. Know that *N.* hath before "me, or my Justices, put *R.* in his place to gain or "lose for him, in the Plea which is between him and "*R.*[1] concerning one plough-Land or concerning any "other thing, (naming it) and, therefore, I command "you, that you receive the aforesaid *R.* in the place of "the said *N.*, in such Plea, to gain or lose. Witness, "&c."

CHAP. III.

When any one, therefore, according to the form before mentioned, is put in the place of another in any suit, it may be asked, whether Essoins shall hold with reference to the person of the Attorney only, or the person of his Principal only, or with regard to both of them? And, indeed, the Essoins of the Attorney himself only shall in such case be allowed, until his appointment is revoked.[2] When any one, so put in the

[1] Here is another instance of confusion, arising from the inaccurate manner in which these letters are inserted!

[2] "The Essoin of the Procurator only shall have place, until

place of another in Court, answer to the suit, and does that which appertains to him, it may be asked, whether his Principal can at his pleasure remove him, and substitute another Attorney, especially if any great degree of Enmity should subsequently arise between them?

That the Principal himself, indeed, may follow up the Suit, the Attorney being removed, is unquestionable; because every Man is understood to put another in his place, under the tacit condition, that he himself cannot be present. The prevailing practice permits a Principal to remove such Attorney, in any part of the Suit, and also to replace him by substituting another in Court, in the manner before mentioned. A Father may thus substitute his Son, and *vice versa:* one stranger may also substitute another; and a Wife her husband. When a Husband, put in the place of his Wife in a suit concerning her marriage-hood or Dower, should lose any part of the property of his Wife, or should, by a Judgment or a Concord, remit any right of the Wife, whether, it may be asked, can the Wife herself again agitate the question, or whether is she absolutely bound, after the death of her Husband, to abide by his Act? It does not seem that the woman in such a case ought, by the Act of her Husband, to lose any part of her right; because, whilst in the power of her Husband, she can in no measure oppose or con-

"the procuratory be revoked." (Reg. Maj. L. 8. c. 16.) Mr. Reeves appears to have viewed the passage of the Text in a different light. (Vide Hist. Eng. Law. 1. 170.)

trovert his Will, and, therefore, she could not, contrary to his pleasure, look into her rights.[1] But, on the other hand, it may be contended, that those Acts which are transacted in the King's Court, ought to be held settled and unalterable.

CHAP. IV.

The Principal is to be distrained to abide by what has been done by his Attorney, whether it be so done by Judgment or by Concord. But what must be done, if the Principal is incompetent to pay, and has nothing whereby he can be distrained, although the Attorney has? The Attorney, indeed, must not be distrained.

CHAP. V.

The principle that we have just laid down, that no one, unless present in Court, can effectually put another in his place, seems contrary to what is contained in the first Book, upon the doctrine of Essoins.[2] For, it is there stated, that if any one should, after his third Essoin, send an Attorney, whoever he happen to be, with Letters, he should be received in Court. But this happens by force of the Judgment. A different Rule

[1] Vide Mirror, c. 5. s. 5.—Ante 97. Not. 8. and M. Houard's Traites sur les Coutumes Anglo-Norm. Tom. 1. 451. where he adopts the same reading, as I contend for, and observes that under the ancient Norman Custumary the wife could not reclaim her Dower.

[2] L. 1. c. 12.

prevails where, urged by an order of the Court, or by a Distress, a person prays to put another in his place in a Suit, to gain or lose for him. It should also be observed, that Abbots and Priors of Canons Regular are received in Court, upon their own authority, without even the Letters of their Convents.

Other Priors, whether of Canons or Monks, if Cellarii[1] even though Aliens, are by no means to be admitted in Court, without the Letters of their Abbot or Grand Prior.[2] The Master of the Knight-Templars and the Chief Prior of the Hospital of Jerusalem[3] are also received upon their own authority; but none of their Orders of a Rank inferior to them are in the habit of being received. When one or more have been substituted in Court to conduct a Suit for another, in the manner before mentioned, whether the one can

[1] I have retained the original word, not merely because I know of no word answering to the complex idea of *Skene*, but that it is very questionable, whether Skene be correct. He thus interprets the word—"If they dwell in cells, separate from "abbies or monasteries." (Reg. Maj. L. 3. c. 18.) From other authorities, I should rather have inferred, that the *cellarii* were a species of monks, invested with the power of providing for their Brethren, and regulating the internal part of their monasteries. But this again is with difficulty to be reconciled to the terms, in which one of them is spoken of—*secundus pater in monasterio*, unless we concur with Spelman, who says, when speaking of the word, *crevisse videtur in amplitudinem.* (Vide Spelman. Gloss. ad voc.)

[2] The Regiam Majestatem, on the contrary, asserts, that they shall be received, without the Letter of their Abbot or Grand Prior. (L. 3. c. 18.)

[3] Of these Orders the Reader will find some mention in 2 Inst. 431.

delegate his authority to another, or whether one of the two can nominate the other, or a third, in his place, or in that of his Principal, to gain or lose for him in that Suit, are points at least questionable[1] ——

[1] "It is answered," says the Reg. Maj. "he may not do so, be-"cause all things are forbidden to a procurator, which are not "expressly granted and committed to him." (L. 3. c. 19.)

Book III.

OF THE PLEA OF RIGHT; AND OF DIFFERENT WRITS OF RIGHT, DIRECTED TO THE SHERIFFS OR LORDS OF THE FEE, UPON VARIOUS OCCASIONS.

CHAP. I.

The preceding Pleas of Right are, directly and in the first instance, commenced in the King's Court, where, as we have observed, they are discussed and terminated. But some Pleas of Right, although not in the first place commenced in the King's Court, are sometimes removed there, when the Courts of different Lords are proved to have failed in doing Justice; for then such Pleas may, through the medium of the County Court, be transferred from thence to the Chief Court of the King, for the various causes shewn in a former part of this Treatise.[1]

CHAP. II.

When, therefore, a person claims any Freehold Tenement, or a Service, as held of another by free service, he cannot draw the person holding it into a Suit, without the King's Writ, or that of his Justices. He shall,

[1] Vide L. 6. c. 8.

therefore, have a Writ of Right, directed to the Lord of whom he claims to hold. If the Plea concern Land, such Writ will be as follows——

CHAP. III.

"The King to the Earl of *W.*, Health.[1] I command "you, that without delay, you hold full Right to *N.* of "ten ploughlands in Middleton, which he claims to "hold of you by the free service of one Knight's fee "for every service; or by the free service of one Hun- "dred Shillings by the Year for every service; or by "the free service of which twelve ploughlands make a "Knight's Fee for every service; or which he claims "to belong to his free Tenement that he holds of you "in the same Vill, or in Mortune by the free service, "&c. or by the service, &c.; or which he claims to "hold of you as the free Marriage-hood of *M.* his "Mother; or in free Burgage; or in free Alms; or by "the free service of going with you in the King's "Army with two horses at his own cost for every "service; or by the free service of finding you one "Cross-Bowman[2] in the King's Army for forty days "for every service; of which *R.*, the Son of *W.*, had "deforced him; and, unless you do so, the Sheriff of

[1] Vide F. N. B. 2.

[2] *Arbelastarium* from the French *arbalestier*. In the distribution of Estates by William the Conqueror, the *Arbelastarii* were reckoned among those noble and military chiefs. the Peers of the Realm. This appears from some passages in Domesday. (Spelman Gloss. ad voc.)

"Northampton shall, least I should hear any more "complaint for want of Justice. Witness, &c." But Writs of Right of this kind are usually infinitely diversified for different causes, as, indeed, will appear from the various forms we shall presently give. But, if the Plea concern a service, the Writ will be as follows——

CHAP. IV.

"The King to *N.* Health. I command you, that "without delay, you hold full Right to *N.* of a hundred "shillings of Rent in such a Vill, which he claims to "hold of you by free service, &c. or the service, &c.; "and, unless you do so, the Sheriff of Oxford shall do "it, least I should any more hear a complaint for want "of Justice. Witness, &c."

CHAP. V.

"The King to *R.*, Health. I command you, that "justly and without delay, you cause *N.* and *A.* his "Wife to have their reasonable part which belongs to "them of one Messuage, in such a Vill, which they "claim to belong to their free Tenement, that they hold "of our Lord the King, in such a Vill, by the free serv-"ice of two shillings by the year; or of one Mark "Rent, in such a Vill, which they claim of the free "Marriage-hood of the said *A.*, of which they complain "that *B.*, the sister of *A.*, has deforced them, or that

"*G.* has deforced them. And, unless you do so, the "Sheriff shall do it, least any further complaint should "be made for want of Justice. Witness, &c."

CHAP. VI.

THESE Suits are in the habit of being conducted in the Courts of Lords, or of those who fill their places, according to the reasonable Customs prevailing in their Courts; which are so numerous and various, that it is scarcely possible to reduce them into writing.[1]

CHAP. VII.

THESE Courts are proved to have failed in doing Justice in this manner. Upon the Demandant's complaining to the Sheriff in the County Courts, and producing the King's Writ, the Sheriff shall send one of his Officers to the Lord's Court on the day appointed the parties by the Lord of such Court, in order that the Officer, in the presence of four or a greater number of the lawful Knights of the County, who by the Sheriff's command shall attend there, might hear and see the proof of the Demandant, namely, that such Court had failed to do him Justice in his Suit. That the fact is

[1] The Regiam Majestatem and Bracton avail themselves of the same excuse, for declining to enlarge on the subject, though the latter observes, that in demanding a view—in vouching to warranty—in proposing exceptions and in waging the Duel, &c. such Courts followed the King's Court—(329. b.)

so, the Demandant shall prove, by his own oath and that of two others, who have heard and known the fact, and shall swear with him.

Under such solemnity, then, Pleas are generally removed from these Courts into the County Court, and are there again discussed and finally terminated, without any contradiction or recovery on the part of such Courts, or the Lords of them, or their Heirs, so far as concerns the Plea in question. But if, previously to such Court being proved in the manner we have stated to have failed in doing right, any Plea should be drawn from it to the superior Court, the Lord of the inferior Court may take advantage of such circumstance and on the day appointed for the Trial of the cause reclaim his Jurisdiction; because his Court has not been proved to have failed in doing Justice; and thus he shall be adjudged to recover it, unless it be there proved, that his Court failed in doing Justice, as before remarked. It should, however, be observed, that if a Plea has been so drawn to the King's Chief Court, it will be in vain for the Lord to reclaim it on the day of trial, unless, on the third day preceding, he had claimed it, in the presence of lawful Men.

But if no day be given to the Demandant on which to make his Complaint, and he has experienced a delay, it will suffice for him to falsify the Court, under the form before mentioned, in whatever part of the Fee he may chuse, if the Lord has no residence[1] within

[1] *Reseantisam.* Vide ante p. 10. Note 1.

the Fee, it being lawful for him, as Lord, to hold his Court there, and put a day to the Demandant, in whatever part of his Fee he chuses. But he cannot legally do so out of his Fee.[1]

CHAP. VIII.

But the Writ to be obtained ought to be directed to him only, of whom the Demandant claims to hold, and not to another, nor even to the Chief Lord. But, it may here be asked, what will be the consequence, if the Demandant claim to hold of one Lord, and the Tenant of another? In such a case, since the Lord to whom the Writ is directed cannot take cognizance of the suit, and unjustly and without a Judgment disseise another Lord of the right of holding a Court, of which he is understood to be seised, recourse must necessarily be had to the County Court, where the Suit shall proceed; or, in the Chief Court, so that both the Lords ought to be present there by Summons, in order that the thing should be discussed before them, in the manner we formerly mentioned when treating of Warranties.

CHAP. IX.

To the Sheriffs, indeed, not only belong the foregoing Pleas of Right, when the Courts of the Lords are proved to have failed in doing Justice, but some

[1] With this concur the Mirror, (c. 2. s. 28.) (Bracton, 330. a.) and the Grand Custumary of Normandy. (c. 6. and 61.)

other Pleas. When, for Example, any one complains to the Court, that his Lord exacts Customs and Services that are not due, or greater services, in respect to the free-hold the Tenant holds of him, than he ought:[1] when the Plea concern a Villein-born, as before observed: or when, generally speaking, any other matter occur of which the Sheriff has the King's Writ, or that of his Chief Justice, for the purpose of holding Jurisdiction over any one, or that he himself should do right, unless another does so, as before mentioned; whenever any such Pleas occur, it belongs to the Sheriff to hear and decide upon them. Some of which appear from the following Writs.

CHAP. X.

"The King to *N.* Health.[2] I prohibit you, least you "unjustly disturb *H.* or permit him to be disturbed, "concerning his Free Tenement, that he holds of you "in such a Vill. Nor exact from him, nor suffer to be "exacted, Customs or Services which he ought not to "render you, or which his Ancestors did not, nor ought "to have done, in the time of King Henry my Grand-"father; and, unless you do so, the Sheriff shall, least "he should any more complain.——Witness &c."

CHAP. XI.

"The King to the Sheriff, Health. I command "you, that justly and without delay, you cause *M.* to

[1] Vide 2 Inst. 21.

[2] Vide F. N. B. 21.

"have *R.* his Villein-born and fugitive, with all his "Chattels, and with his whole issue,[1] wheresoever he "is found in your Bailiwick, unless the fugitive be in "my Demesne, after my first Coronation. And I pro- "hibit, least any one unjustly detain him under for- "feiture, &c. Witness &c."

CHAP. XII.

"The King to the Sheriff, Health.[2] I command "you, that justly and without delay, you cause *G.* to "have his Beasts by Gage and pledges, of which he "complains that *R.* has taken them, and unjustly de- "tains them, for the Customs which he exacts from "him, and which he does not acknowledge to owe "him; and, in the mean time, cause him justly &c. "least &c."

CHAP. XIII.

"The King to the Sheriff, Health. I command you, "that justly and without delay, you cause to be ad- "measured the pasture in such a Vill, which *I.* who

[1] *Cum totâ sequelâ suâ.* Mr. Barrington having observed, that if Villeins were born within a certain District, they and their issue were the Bondmen of the Lord, proceeds thus,—"This ex- "plains what frequently occurs in ancient grants of Villeins, "*cum totâ sequelâ suâ*, which, according to Sir James Ware, in "his account of the Betaghii, (who were the Irish Villeins,) in- "cluded not only Children but Nephews, p. 149. See also Ma- "dox's Form. Angl. p. 416." (Barr. Obs. on Anc. Stat. p. 306.)

[2] Vide F. N. B. 152.

" was the wife of *P.* and *R.* her sister, complain that *H.* " had unjustly surcharged; nor permit that the afore- " said *H.* should have in that Pasture more beasts " than he ought to have, and than belongs to him to " have, according to the extent of the Fee which he " has in that Vill, least &c. Witness &c."

CHAP. XIV.

" The King to the Sheriff, Health. I command you, " that without delay, you command *R.* that, justly " and without delay, he permit *H.* to have his Ease- " ments[1] in the Wood[2] and in the Pasture of such a " Vill, which he ought to have, as he says; as he " ought to have them, and usually has had them; and " that you permit not the aforesaid *R.* or any other to " molest or injure him, least &c. Witness &c."

CHAP. XV.

" The King to the Sheriff, Health. I prohibit you, " least you permit, that *R.* unjustly exact from *S.* for " the free Tenement which he holds of *N.* of the Fee " of the said *R.* in such a Vill, more service than be-

[1] *Aisiamenta*—from the French *aise*, *voluptas*. (Spelm. Gloss. ad voc.)

[2] *Bosco*. This word sometimes means the wood merely—sometimes it includes the land on which the wood grows. (Co. Litt. 4. b.)

"longs to that free Tenement that he holds; and that "you cause to be replevied to him his Beasts, which "were taken for that demand, which he does not ac- "knowledge, as belonging to the Free Tenement he "holds; until the Plea be heard before us, and it be "known, whether such service is due or not. Wit- "ness &c."

CHAP. XVI.

"The King to the Sheriff, Health.[1] I command "you, that justly and without delay, you make reason- "able divisions between the Land of *R.* in such a "Vill and its appurtenances, and the Land of *D.* in "such Vill, as they ought to be, and are accustomed "to be, and as they were in the time of King Henry "my Grandfather, of which *R.* complains, that *A.* "has, unjustly and without Judgment, encroached "more than belongs to his free Tenement in that Vill, "least &c. Witness &c."

CHAP. XVII.

"The King to the Sheriff, Health. I command you "that justly and without delay, you cause to abide, "the reasonable Division which *R.* made to the "Brethren of the Hospital of Jerusalem of his Chattels, "as it can be reasonably shewn that he made it, and "that it ought to be abided by. Witness &c."

[1] Vide L. 9. c. 14. where a similar writ occurs.

CHAP. XVIII.

"The King to the Sheriff, Health. I command you, "that you compel *R.* that justly and without delay, "he returns to *N.* his Chattels, which he claims that "he took, unjustly and without a judgment, in his "Freehold, in such a Vill, since the Disseisin which he "did him, since my Assise, of which he recovered his "Seisin before my Justices by a Recognition of Novel "Disseisin, as it can be reasonably shewn that he ought "to have them, least &c."[1]

CHAP. XIX.

"The King to the Sheriff, Health. I command you, "that you cause a delay until a certain fit time, when "you can be present, of the Recognition which is summoned between *R.* and *M.* concerning the divisions[2] "of such Vills, which by my Justices of those parts is "injoined to you and *H.* to take before you; for the "taking of which, as it is said, you have deputed others "in your place, because it is not the Custom that when "any matter appertaining to my Judges[3] is injoined

[1] Vide 2 Inst. 311.

[2] Vide ante p. 133. Note 1.—As to the latter part of the present Writ, our author surpasses even himself in quaintness of expression.

[3] *Ad Justicias.* *Justicia*, a Justice, or Judge, or, as it has in subsequent times been written, *Justiciarius.* (Vide Selden op.

"to others to be executed, that they should transfer "over to others again any thing which appertains to "my Judge. Witness &c."

CHAP. XX.

"The King to the Sheriff, Health. I command you, "that justly and without delay, you cause *A.* who was "the Wife of *R.* to have her reasonable Dower of the "whole Fee that was the said *R*'s, exactly and in every "thing, save to his Heir the capital Messuage, and that "you cause the said Wife to have another messuage, "unless any Land in which there is no Messuage may "have been named to her in Dower; and it shall not "cease, because the Fee of the aforesaid *R.* is held of "my Barony, because, I will not, nor does the Law re-"quire, that the Wives of Knights should on account "of this lose their Dower. But, of the Chattels that "were of the aforesaid *R.* I command you, that you "cause them all to be in peace, so that no part be re-"moved, neither to make division, nor for any other "purpose, until his debts are entirely discharged; and of "the residue there shall be afterwards a reasonable divi-"sion made, according to the Custom of my Land. "And, if any part of the Chattels of the aforesaid *R.* "shall have been removed since his death, it shall be

Omn. 1669. Madox's Exch. 24. &c.) Mr. Selden considers the use of this term by Glanville as a proof, that the work itself is of the age of Henry the 2nd, as we have already observed, in our introductory address to the Reader.

"returned to his other Chattels to pay his Debts.
"Witness &c."

CHAP. XXI.

"The King to the Ecclesiastical Judges, Health.[1]
"I prohibit you, least you hold the Plea in Court Chris-
"tian, which is between *N.* and *R.* of the lay Fee of
"the aforesaid *R.* of which he complains that *N.* draws
"him into Plea in Court Christian, before you, because
"such Plea belongs to my Crown and Dignity. Wit-
"ness &c."

CHAP. XXII.

"The King to the Sheriff, Health. Prohibit R. least
"he should follow the Plea in the Court Christian
"which is between *N.* and him of the lay Fee of the
"aforesaid *R.* in such a Vill, of which he complains
"that the aforesaid *N.* draws him into Plea in Court
"Christian before those Judges. And, if the afore-
"said *R.* shall make you secure of prosecuting his
"claim, then, put by Gage and safe Pledges, the afore-
"said *N.* that he be before me, or my Justices, such a
"day, to shew wherefore, he has drawn him into Plea
"in Court Christian, concerning his lay Fee, in such a
"Vill, as such Plea belongs to my Crown and Dignity.
"Witness &c."[2]

[1] Vide F. N. B. 90.

[2] This Writ stands also in need of a Transposition of the Capitals to render it intelligible.

CHAP. XXIII.

With respect to the manner or the right of commencing or terminating these Pleas, or others in different County Courts, I forbear to speak, as well on account of the different Customs which prevail in different Counties, each observing its own peculiar Customs, as of the brevity of my proposed object, no Pleas coming within the scope of it, but those which are usually discussed in the King's Chief Court.

CHAP. XXIV.

It should also be observed, that in a Writ of Right sometimes less is comprised than is inserted in the Count in Court, as well respecting the Appurtenances as other things; but sometimes more is included. Sometimes there is an Error in the Writ, as to the name inserted in it, sometimes concerning the quantity of Services. When, indeed, less is contained in the Writ than in the Count, the party cannot demand more by force of the Writ, than is comprised in it. But when more is contained in the Writ, than in the Count, the Excess which is comprised in it may be remitted, and the residue may be claimed by virtue of the Writ. But, if there be an Error in the name, then, by strictness of Law, another Writ must be sued out. But when the Error concern the quantity of service, the Writ, in strictness of Law, is also lost.

Yet, as it sometimes happens, that a Tenement is demanded by less service than is due in respect of it, or than has been accustomed to be rendered to the Lord, it may be asked, whether the Lord is bound by the Writ to do right to the detriment of his own service? He is, indeed, bound; but should the Demandant happen to prevail, the Lord after Eviction may recover against the party evicting him.[1]

CHAP. XXV.

It should also be added, that, according to the Customs of the Realm, no one is bound to answer in his Lord's Court, concerning his Freehold Tenement, without the King's precept, or that of his Chief Justice; I mean, if the Fee in question be a lay one.

But, if the Plea should be between two Clerks, concerning a Tenement held in Frankalmoigne of an Ecclesiastical Fee, or if the Tenant, a Clerk, hold an Ecclesiastical Fee in Frankalmoigne, whoever may happen to be the Demandant, the Plea concerning the Right ought to be in the Ecclesiastical Court, unless a Recognition should be demanded, whether the Fee in question be Ecclesiastical or lay, of which we shall presently speak. For then such Recognition, as, indeed, certain others, must be held in the King's Court.

[1] Namely, the services really due in respect of the Tenement.

Book XIII.

CONCERNING PLEAS BY ASSISES AND RECOGNITIONS. AND OF DIFFERENT KINDS OF DISSEISINS.

CHAP. I.

The general course of Proceedings, as they more usually occur in Court upon the foregoing Writs of Right, having been so far treated of, it now remains to speak concerning the steps commonly resorted to, where Seisin alone is in question. As these questions are, under the beneficial provisions of a Law of the Realm, which is termed an Assise, usually and for the most part decided by a Recognition, our subject leads us to treat of the different kinds of Recognitions.

CHAP. II.

There is one species of Recognition which is called *mort D'Auncestor*[1]—another *de ultimis presentationibus* of Parsons to their churches—another, whether a Tenement be an Ecclesiastical Fee or Lay Fee—another, whether any one was seised of a Freehold on the day of his death, as of fee or as of pledge—another,

[1] Vide Bracton 252. a. et. seq.

whether any one be under age or of full age—another whether any one died seised of a certain Freehold as of fee, or as of ward—another, whether any one presented the last Parson to a Church, by virtue of the Fee that he held in his Demesne, or by virtue of a Wardship.—And others of a similar description, which, as they frequently arise in Court when the parties are present, are, with their consent and the advice of the Court, directed, in order to determine the point in controversy. But there is another Recognition which is called *Novel Disseisin*. When, therefore, any one dies seised of a Freehold in his Demesne as of Fee, the Heir may justly claim the seisin of his Ancestor; and, if he be of full age, he shall have the following Writ—

CHAP. III.

"The King to the Sheriff, Health.[1] If *G.*, the son "of *T.* shall make you secure of prosecuting his claim, "then, summon by good Summoners, twelve free and "lawful Men of the Neighbourhood of such a Vill, "that they be before me, or my Justices, on such a "day, prepared on their oath to return, if *T.* the father "of the aforesaid *G.* was seised in his Demesne as of "Fee, of one Yardland, in that Vill, on the day of his "death—if he died after my first Coronation,[2] and if

[1] Vide F. N. B. 433.

[2] This, Lord Coke informs us, was the 20th of October 1154. (2 Inst. 94.) A limitation of between 30 and 40 years.

"the said *G.* be his nearer Heir. And, in the mean "time, let them view the Land and cause their names "to be imbreviated; and summon, by good Summoners, "*R.* who holds that Land, that he be then there to "hear such Recognition; and have there the Sum- "moners &c. Witness &c." But, if the Ancestor was seised in the manner before mentioned, and had begun a Voyage, then, the Writ will be as follows—

CHAP. IV.

"The King to the Sheriff, Health.[1] If *G.* the Son "of *T.* shall make you secure of prosecuting his claim, "then summon by good Summoners, twelve free and "lawful Men of the Neighbourhood of such a Vill, "that they be before me, or my Justices,[2] such a day, "prepared upon their oaths to return, if *T.* the father "of the aforesaid *G.* was seised in his Demesne as of "Fee of one Yardland, in such a Vill, the day on which "he began his Journey to Jerusalem, or to St. Jago, "in which Journey he died.——And, if he began his

[1] Vide F. N. B. 434. In this Writ, says Fitzherbert, it sufficeth, if he were seised the day he went out of the Land and took the Sea, although it was not the day of his death. (Ubi supra.)

[2] "Before this Statute," says Lord Coke, commenting on Mag. Carta, "the Writs of Assise, of Novel Disseisin and Mortdanc' "were returnable either *coram rege*, or into the Court of Com- "mon Pleas: and this appeareth by Glanville—*coram me vel* "*coram Justiciariis meis.* But, since this Statute, these Writs "are returnable, *coram Justiciariis nostris ad Assisas cum in* "*partes illas venerint.*" (2 Inst. 24.)

"Journey since my first Coronation, and if the afore-
"said *G.* be his nearer Heir. And, in the mean time
"&c." as before. But, if the Heir be within age, then the Writ will be as follows—

CHAP. V.

"The King to the Sheriff, Health. Summon by "good Summoners, &c." in all respects as in the foregoing, except that in the present Writ this clause in the beginning shall be omitted, "if *G.* the Son of *T.* "shall make you secure of prosecuting his claim."[1]

Also this clause in the body of the Writ is omitted, "if *T.* the Father of the aforesaid *G.* died after my "first Coronation." But, if he assumed the habit of Religion, then the Writ, in conformity to this circumstance, will be varied in the following manner—

CHAP. VI.

"The King to the Sheriff, Health. If *G.* the Son "of *T.* make you secure &c." in all respects as before, excepting that in the present Writ there must be inserted in the Body of it, "prepared upon their oath "to return if *T.* the father of the aforesaid *G.* was "seised in his Demesne as of Fee, of so much Land in

[1] Vide Fitz. N. B. 434.

"such a Vill, the day on which he assumed the habit "of Religion; and, if he assumed such habit after my "first Coronation; and, if the aforesaid *G.* be his "nearer Heir; and, in the mean time, that they view "the Land &c." as before.

CHAP. VII.

THE Writ of *Mort D'auncestor*[1] having been received by the Sheriff, and security given by the Demandant in the County Court to prosecute his claim, the Proceeding in this manner comes to an Assise. In the first place, twelve free and lawful Men of the Neighbourhood are to be elected, according to the form expressed in the Writ, both parties being present, as well the Demandant, as the Tenant, or the latter being absent, provided he has been summoned once, at least, to be present at the Election. He is, indeed, to be once summoned in order that he may be present, and hear who are elected to make such Recognition. Some of them he may for a reasonable cause object to, if he is so inclined, and they shall be

[1] Though the Writs inserted in the three foregoing Chapters appear to be framed with a view to the death of the Demandant's Father, yet we are not from thence to infer, that the remedy, now under consideration, was confined in its application to the death of a Parent only, since the Ancestor in a Writ of *mort d'auncestor* was intended of the Father, Mother, Brother, Sister, Uncle, Aunt, Nephew, or Niece of the Demandant. But here it ended. (See Bracton, 254. 261. and 2 Inst. 399.)

excluded from the Recognition. If he should not appear at the first Summons, regularly proved in Court, he shall not be awaited any longer; but, though he be absent, the twelve Jurors shall be elected, and then sent by the Sheriff to take a View of the Land or other Tenement in question. Yet the Tenant shall have one Summons on this account. The Sheriff shall cause the names of the twelve persons elected to be imbreviated. Having done this, the Sheriff shall cause the Tenant to be summoned to appear on the day appointed by the King's Writ, or that of his Justices, before the King, or his Justices, to hear the Recognition.

But, if the Demandant be of full age, the Tenant may essoin himself on the first and second day,[1] but on the third day he cannot do so, since the Recognition shall be then taken, whether the Tenant appear or not; because in no Recognition, where Seisin alone be in question, are more than two Essoins allowed.

But, in a Recognition of Novel Disseisin, no Essoin is permitted. On the third day, therefore, whether the Tenant appear or not, the Assise must be taken, as we have observed; and, if the Jurors should decide for the Demandant, Seisin shall be adjudged him, and the Sheriff shall be directed to put him into Seisin, by the following Writ——

[1] "The reason why Assises were more expeditious than other "remedies, arose from no Essoin being allowed in them"—says Mr. Barrington, (Observations on Ancient Statutes, p. 105.) which, from the text of Glanville, appears evidently to be an inaccuracy, as a *general* position.

CHAP. VIII.

"The King to the Sheriff, Health. Know, that *N.* "has, in my Court, recovered Seisin of so much Land, "in such a Vill, by a Recognition of *Mort D'auncestor* "against *R.* and, therefore, I command you, that you "cause him to have the Seisin without delay—Wit- "ness &c."

CHAP. IX.

But, together with the Seisin, the successful party shall recover the possession of all the chattels and other things found in the Fee, at the time of delivering Seisin. But, after the Seisin has been fully recovered, the party who has lost it may sue concerning the Right, by means of a Writ of Right. Yet it may be questioned, to what time this is to be restricted, after restitution has been fully made.

CHAP. X.

But, if the decision be in favor of the absent Tenant, the Seisin shall then remain to him, without his Adversary being able to recover it. But such Seisin shall be no bar to a Suit concerning the Right. Nor shall a Plea of Right concerning any Tenement, prevent a Recognition for recovering the Seisin of a person's An-

cestor in the same Tenement, previously to the waging of the Duel. But, how then shall his contempt of Court be punished?

CHAP. XI.

Both Parties being present in Court, it is usual to inquire of the Tenant whether he can shew any reason, why the Assise should not proceed? And, here it should be observed, that a person of full age sometimes demands a Recognition of this kind[1] against a Minor—sometimes a Minor demands it against one of full age—sometimes a Minor against a Minor—sometimes one of full age against another of that description.[2] Generally speaking, the Assise shall not proceed, if the Tenant admits in Court, that the Ancestor, on the strength of whose Seisin the Demandant founds his claim, was seised on the day of his death in his Demesne as of Fee, with the other circumstances expressed in the Writ.

But, if the Seisin only be conceded, the other circumstances not being admitted, then, the Assise shall proceed upon the circumstance or circumstances not conceded. An Assise of this kind is accustomed to cease for many causes—if, for example, it should be

[1] No one of full age was allowed by the Norman Code to prosecute a *Mort D'auncestor*, unless he had purchased his writ within a year and a day after his Ancestor's death had been publicly proclaimed. (Grand Cust. c. 99.)

[2] See Bracton 274. a. et seq.

alleged by the Tenant, that the Demandant was seised after the death of his Father, or any one of his Ancestors, whether the Ancestor was seised or not, on the day of his death; and, whilst the Demandant was in such Seisin, that he had done, with respect to himself, some such act as debarred him of subsequently resorting to the Assise—as if he had sold, given, or quitted claim, or, by any other lawful means, had disposed of the Land in question to the Tenant.[1]

Should such a defence be set up, recourse may be had to the Duel, or to any other usual mode of proof, consistent with the practice of the Court, where the Right to any property is in question. The same observation applies, should it be alleged by his Adversary, that the Demandant had, on a former occasion, impleaded him, when a Fine was made between them in the King's Court; or that the Land belonged to the Tenant by the decision of the Duel, in whatever Court it may have been waged; or by a Judgment, or by quit-claim.[2] Villenage, also, if it be in Court objected and proved against the Demandant, takes away the Assise.[2] An exception of Bastardy has the same effect.[3] The King's Charter, also, in which the Land, the Seisin of which is demanded by the Assise, is specifically named or confirmed to the Tenant, as, indeed, the conjunction of more Heirs than one, of

[1] Bracton, 270. b.

[2] Bracton, 271. b.

[3] Bracton, 271. b. and Ante L. 5. c. 5.

[4] Bracton, 280. a. and Ante L. 7. c. 13.

Females, for example, in a Military Fee, or of Males or Females in free soccage Tenure.[1]

Again—if it be conceded, that the Ancestor upon whose Seisin the Demandant founds his claim, had a certain degree of Seisin, namely—one derived through the Tenant himself or his Ancestor, as from a Pledge, a Loan or any other cause of this nature, the Assise shall not go forward, but recourse must be had to another mode of proceeding.

Consanguinity, also, takes away the Assise; namely, if the Demandant and Tenant should have sprung from the same stock from which the Inheritance, the Seisin of which is in question, has descended, and such fact has been objected and proved in Court.[2] Another cause has been mentioned in treating of Marriage-hood, when the Eldest Son has given a certain part of his Lands to his Younger Brother, who dies without leaving any Heir of his Body.[3] In this case, as in others of a similar description, the Assise we are now treating of shall cease, since the same person cannot be both Heir and Lord of an Estate.[4] If, also, the Demandant be convicted, or, indeed, confess, that he was formerly in Arms against the King, the Assise which he so demands in Court shall from such circumstance cease.[5] By reason, also, of Burgage Tenure, the Assise does not usually proceed. This is in compliance with a par-

[1] Bracton, 272. b.—See ante p. 126. Note 2.
[2] Vide ante L. 2. c. 6.
[3] Vide ante L. 7. c. 1.
[4] Vide ante L. 7. c. 1.
[5] Bracton, 272. b.

ticular Law of the Realm,[1] having for its object greater utility. But, if no exception be taken in Court, on account of which the Assise ought to cease, the Recognition shall proceed; and, in the presence of both parties, the Seisin shall, on the oaths of the twelve Jurors, and according to their verdict, be adjudged to the one or the other, in the manner described in a former part of this Book.

CHAP. XII.

But, when a Minor prays an Assise of the kind we are treating of against one of full age, then, indeed, the latter shall not be allowed any Essoin against the former, because, on the first day, the Recognition shall proceed, whether the Tenant appear, or absent himself. And this upon a general principle.

For, whenever it happens, that the Tenant, if present in Court, cannot allege any cause why such Assise ought not to proceed, the Recognition ought by right

[1] We may conjecture, that this Law was corroborative of the particular Customs of certain Cities and Boroughs, under which the Citizens and Burgesses could make a Will of Lands.

Where such Customs prevailed, it was an idle thing to inquire whether the Ancestor died seised. It seems, London and Oxford enjoyed these Customs. (Bracton fo. 272.) Mr. Somner conceives, that the utility aimed at by the Law in question and the foundation of it was, the good of the Commonwealth, by the maintenance of traffic, which was much encouraged by the liberty of a free devise, though this is somewhat darkly pointed at, as he says, by Glanville in the present passage. (Somner on Gavelkind, p. 97.)

to proceed, without awaiting the appearance of the adverse party. But, if the Tenant were present, he could not, as we observed, allege that the Minor had done any thing on account of which the Assise should cease; and, therefore, the Recognition shall unquestionably proceed, whether the Tenant, being of full age, appear or not, according to the form before mentioned; and thus, restitution having been made to the Minor through the Recognition, the full age of the Minor shall be awaited, if it be intended to sue him concerning the Right. But when one Minor sues another, the Recognition shall proceed in the same manner, and without any variation, as it usually does between a Minor and one of full age.

CHAP. XIII.

But, when a person of full age proceeds against a Minor, the latter, indeed, may avail himself of an Essoin against his Adversary, in the usual manner. When he appears, he may pray a delay, on account of his Age, and that the Recognition may not be taken, until he is of full age; and, thus, on account of Age, the Recognition of *mort d'auncestor* usually stands over. But here we should observe, upon the necessity which exists, in order that such Assise should stand over on account of his age, that the Minor should allege himself to be in Seisin of the Tenement in question, and, therefore, that the Recognition ought not to proceed, before he has attained his full age: nor should he

omit, that his Father or some other Ancestor was seised on the day of his death; since, neither a Recognition against a Minor, nor even a suit concerning the propriety, shall cease, by reason of the Seisin of a Tenement which any Minor has himself acquired and retains only by his own right. But, if it be replied to a Minor, that his Ancestor died seised of the Tenement, the Seisin of which is sought by the Recognition, not as of Fee, but as of Ward, then, indeed, although the principal Recognition ought to cease, on account of the Minor's age, yet another Recognition shall proceed upon the point, whether the Minor's Ancestor was seised as of Fee or of Ward, on the day of his death; and the Assise shall be summoned, by the following Writ.

CHAP. XIV.

"The King to the Sheriff, Health. Summon by "good Summoners, twelve free and lawful Men of the "Neighbourhood of such a Vill, that they be before "me, or my Justices, at such a day, prepared upon "their oaths, to return, if *R.* the Father of *N.* who is "within age, was seised in his Demesne of one plough-"land in that Vill, of which *M.* the Son and Heir of "*I.* prays a Recognition of the death of the said *I.* "his Father, against the said *N.* as of his Fee on the "day he died, or as of Ward. And, in the mean time, "let them view that Land; and cause their names to "be imbreviated. And summon, by good Summon-

" ers, the aforesaid *N.* who holds such Land, that he " be then there to hear the Recognition. And have " &c."

CHAP. XV.

But, it should be observed, that if a day has been given for this purpose to both parties, when present in Court, then, the Tenant ought not to be summoned. But thereupon, a Recognition shall proceed to be taken on the oaths of twelve Jurors, and, according to their Verdict, shall it be declared, what Seisin the Minor's Ancestor had, on the day of his death, in the Tenement in question; and, if it should be proved, that the Ancestor of the Minor had no Seisin on the day of his death, unless as of Ward, then, the Demandant shall recover Seisin against the Minor. But, it may be questioned, whether this alone be sufficient to enable him to recover Seisin.

It does not appear to be so; because this by no means proves, that the Demandant's Ancestor was seised in his Demesne as of Fee, on the day of his death; nor even that the Demandant be his nearer Heir. But, on the contrary, it may be said, that this being proved, the Minor has consequently no right afterwards to retain the Seisin. But if this assertion be correct, to whom is the possession to be restored? whether, in such a case, must recourse be had to the principal Recognition? If, however, it be proved by

the oaths of the twelve Jurors, that the Minor's Ancestor was seised on the day of his death, as of Fee, then, the Seisin shall continue to the Minor without disturbance, until he arrives at his full age.

But, in such a case, can his Adversary or his Heirs on any future occasion be again heard? He may at least with respect to the Propriety of that Tenement, as against the Minor, when he has attained his full age, or against his Heirs. In addition, the Assise should proceed against a Minor in that one case only, which we observed, in treating concerning Heirs within age.[1] Upon the Assise proceeding against a Minor, if the Seisin should be awarded to continue with him, he shall not answer concerning the Right, until he has attained his full age. For, it is a general principle, that a Minor is not obliged to answer to any suit by which he may possibly be deprived of his Inheritance, or by which he can lose life or member, until he attain his full age. Yet, in certain other cases, he is bound, as, for example, respecting his paternal Debts, or his own, and in case of a Novel Disseisin. Should, however, the Seisin be adjudged against the Minor, in favor of the Demandant, restitution shall be made to him in the form before mentioned, nor shall he answer to the Minor upon the question of Right, until such Minor has attained his full age, as the latter would not be bound to answer the Demandant. The reason is of general force: because, such transactions, as take place

[1] Vide L. 7. c. 9. &c.

with Minors, in Pleas of this description, ought not to be held firm and unalterable.

But if, on a Minor alleging himself intitled to the privilege of his age, it should in Court be objected, that he is of full age, this is usually ascertained by a Recognition of eight free and lawful Men, who are to be summoned for such purpose, by the following Writ—

CHAP. XVI.

"The King to the Sheriff, Health. Summon, by "good Summoners, eight[1] free and lawful Men of the "Neighbourhood of such a Vill, where the Tenement in "question is, that they be before me or my Justices, "on such a day, prepared on their oaths to return, "whether *N.*, who claims one Hyde of Land in that "Vill by my Writ against *R.*, be of such age, that he "can and ought to sue; and, in the mean time, let them "view that Land, and cause their Names to be imbre-"viated; and Summon, by good Summoners, him who "holds the Land, that he be then there to hear that "Recognition. And have, &c."

CHAP. XVII.

If, therefore, the full age of the person whose age is in dispute shall be proved by such Recognition, from

[1] Vide F. N. B. 569. where twelve Jurors are mentioned.

thenceforward he must be treated as one of full age, so far as respects the principal Recognition. But, *it* may be doubted, whether, generally speaking, and with reference to the suits[1] of others, he should, by force of the present Recognition, be considered as of full age, in such manner as not to be able to protect himself under the privilege of age. But, if such Recognition should find him a Minor, he shall avail himself of the privilege of infancy, so far as respects the principal Recognition; but, it may be questioned, how far he can avail himself of it on other occasions and in other suits.

CHAP. XVIII.

It follows, that we speak of the Recognition *de ultimâ presentatione*.[2] If, upon the vacancy of a Church, there be a controversy concerning the Presentation, it

[1] *Impetitionem* pro *impetitiones*. The term appears to be generally employed to designate a criminal proceeding; and, if we meet with it connected with the term waste—*sine impetitione vasti*, we must recollect, that waste under the feudal law was considered as a criminal offence. A much greater latitude was afterwards allowed in the application of the term. (Vide Spelm. Gloss. ad voc. impetitus and impetitio and Cowell ad voc. *impeachment*, &c.)

[2] Vide Bracton 237. b. et seq. It is not, perhaps, irrelative to observe, that Lord Coke refers to this and the two following chapters among other authorities to prove, that, at Common Law, if a stranger had presented his clerk and he had been admitted and instituted to a church, whereof any subject had been lawful Patron, the Patron had no other remedy to recover his advowson, but a writ of right of advowson, wherein the Incumbent was not to be removed. (Co. Litt. 344. a.)

may be decided by a Recognition *de ultimâ presentatione*, upon either of the litigating parties requiring it in Court. On such an occasion, he shall obtain the following Writ—

CHAP. XIX.

"The King to the Sheriff, Health.[1] Summon, by "good Summoners, twelve free and lawful Men of the "Neighbourhood of such a Vill, that they be before "me, or my Justices, such a day, prepared on their "oaths to return, what Patron presented the last Par- "son who died, to the Church of such a Vill, which is, "as it is said, vacant, and of which *N.* claims the Ad- "vowson; and cause their names to be imbreviated; "and summon, by good Summoners, *R.*, who deforced "that Presentation, that he be then there to hear the "Recognition—and have there, &c."

CHAP. XX.

As to the Essoins allowed in this species of Recognition, they may be collected from what has gone before. Upon the Recognition proceeding, whether both of the parties be present, or one of them be absent, the person, to whom, on his own, or his Ancestor's Seisin, the last Presentation shall be adjudged, is understood

[1] F. N. B. 68.

thereby to have recovered Seisin of the Advowson itself; so that, upon his Presentation, the Bishop of the place shall institute the first Parson, if a proper person,[1] into the vacant Church, which he shall retain during his whole life upon his Patron's Presentation, whatever may afterwards happen, with respect to the Right of Advowson. For the person, against whom the last Presentation has been awarded by the Recognition, may proceed against the other, or his Heirs, upon the Right of Advowson, the nature of which has been explained, in a former part of this Treatise. It may be asked, whether, from the first, any thing can be alleged to prevent the Assise from going forward. In order to effect such object, the Tenant may admit, that the Ancestor of the Demandant made the last Presentation, as the real Lord and the Eldest Heir, but that he afterwards transferred the Fee, to which the Advowson is appendant, to the Tenant or his Ancestors, by a good Title; and thus upon this allegation the Assise shall cease, and a Plea may then be had recourse to between the litigating parties, upon this exception. Upon this exception, either of the parties may desire a Recognition, and is intitled to have it. But either of the litigating parties may admit, that the other, or one of his Ancestors, made the last Presentation, but not as of Fee, but of Ward, and may demand, and shall obtain, a Recognition upon this point. Such Recognition shall be summoned by the following Writ—

[1] "A worthy man, qualified in literature, life, and manners"—are the words of the Reg. Maj. L. 1. c. 2. Vide 1 Bl. Comm. 389.

CHAP. XXI.

"The King to the Sheriff, Health. Summon, by "good Summoners, twelve free and lawful Men of "the Neighbourhood of such a Vill, that they be be- "fore me, or my Justices, at such a day, prepared on "their oaths to return, if *R.*, who presented the last "Parson, who is dead, to such a Church, by reason of "the Tenement that he held in such a Vill, made "such Presentation, as of Fee, or as of Ward,[1] and "cause their names to be imbreviated; and summon, by "good Summoners, him who has deforced the Presen- "tation, that he be then there, &c."

CHAP. XXII.

The fact being ascertained by the Recognition, if the last Presentation was made as of Ward, the Advowson of the Presentation is at an end, and the Presentation itself shall belong to the other party. But if, as of Fee, the Presentation shall continue to him.

CHAP. XXIII.

It follows to treat of the Recognition to ascertain, whether a Tenement be a Lay, or an Ecclesiastical Fee. Upon either of the parties desiring to have such

[1] "And, in the mean time. let them view the Tenement"—added in Cotton. and Bodln. MSS.

Recognition, it shall be summoned by the following Writ—

CHAP. XXIV.

"The King to the Sheriff, Health. Summon, by "good Summoners, twelve free and lawful Men of "the Neighbourhood of such a Vill, that they be be- "fore me, or my Justices, such a day, prepared upon "their oaths to return, whether one Hyde of Land, "which *N.*, the Parson of the Church of that Vill, "claims, as held in Frankalmoigne by his Church, "against *R.* in that Vill, be the Lay Fee[1] of the said "*R.*, or an Ecclesiastical Fee; and, in the mean time, "let them view the Land, and cause their names to be "imbreviated. And summon, by good Summoners, "the aforesaid *R.*, who holds that Land, that he be "then there to hear the Recognition, and have there, "&c. Witness, &c."

CHAP. XXV.

Neither in this Recognition, nor in any other, except the Recognition of the Grand Assise, are more than two Essoins permitted. Because a third Essoin

[1] *Sit laicum feodum.* "A *Juris Utrum* did lie at the Common "Law for a Parson against a Layman, and for a Layman against "a Parson: but no *Juris Utrum* did lie for one Parson against "another, before this Act, (Westmr. 2d.) because it was the "Right of the Church and no Lay Fee. And the words of the "writ at the Common Law were, *an sit laicum feodum, &c.*" (Vide 2 Inst. 407. and the authorities cited by Lord Coke.)

is never allowed, unless where it can be judicially ascertained, whether an illness amount to a languor or not. As this is not usually done in Recognitions, they necessarily preclude a party from casting a third Essoin. The Recognition we are now treating of proceeds in the manner we have described, when discussing other Recognitions. Yet, should it be observed, that if, by the Recognition, a Tenement be proved to be an Ecclesiastical Fee, it cannot afterwards be treated as a Lay Fee, although it may be claimed by the Adverse party to be held of the Church, by a stipulated service.

CHAP. XXVI.

Our subject leads us, in the next place, to consider that species of Recognition which is usually resorted to, in order to ascertain, whether a person died seised of a certain Freehold, as of Fee or as of Pledge. When any one claims a certain Tenement to be restored to him, as pledged, either by himself, or one of his Ancestors, if the Tenant does not acknowledge the Tenement in question to be a pledge, but asserts in Court that he is seised of it as of Fee, recourse is usually had to a Recognition, which shall be summoned by the following Writ——

CHAP. XXVII.

"The King to the Sheriff, Health. Summon, by "good Summoners, twelve free and lawful Men of

"such a Vill, that they be before me, or my Justices, "such a day, prepared upon their oaths to return, "whether *N.* holds one plough-land in such a Vill, "which *R.* claims against him by my Writ, in Fee or "in Pledge, as pledged to him by the said *R.* or by "*H.*, his Ancestor." Or thus—"whether that plough-"land, which *R.* claims against *N.*, in such a Vill, by "my Writ, be the Fee or Inheritance of the said *N.*, "or Pledged to him by the said *R.*, or by the said *H.*, "his Ancestor; and, in the mean time, let them view "that Land; and cause their names to be imbreviated; "and summon, by good Summoners, the aforesaid *N.*, "who holds that Land, that he be then there to hear "the Recognition—And have there, &c."

CHAP. XXVIII.

But, it sometimes happens, that a person holds a Tenement as a pledge, and so dies seised of it. His Heir, also, by reason of such a Seisin, prays a Writ of Mort D'auncestor against the true Heir, who has obtained the Seisin of the Tenement in question. If, indeed, it should then be acknowledged by the Tenant, that the Ancestor of the Demandant had died seised, but as of Pledge, and not as of Fee, the consequence is, that recourse must be had to the before mentioned Recognition, which shall be summoned by the following Writ——

CHAP. XXIX.

"The King to the Sheriff, Health. Summon, by "good Summoners, twelve, &c., that they be, &c. "prepared upon their oaths to return, whether *N.*, "the father of *R.*, was seised in his Demesne, as of "Fee, or as of Pledge, of one plough-land, in such a "Vill, the day on which he died. And, in the mean "time, &c."

CHAP. XXX.

It being proved by the Recognition, that the Tenement in question is a pledge, then, the Tenant who has asserted it to be his Fee shall lose the Tenement in question, so that he shall not, by reason of its having been a pledge, recur to it for the recovery of his Debt.[1] But, if it be decided to be the Fee of the Tenant, then, the Demandant shall from henceforth be barred from any recovery unless by a Writ of Right. It may be asked, whether in this Recognition, or in any other, a person's Warrantor should be awaited, whatever description of Warrantor, or for whatever cause he may be such, especially if the Warrantor should be called into Court upon this subject after two Essoins?

[1] The text is obscure, and contradictory: most probably, falsely transmitted to us.

This is answered in the affirmative by the Regiam Majestatem. L. 2. c. 35.

CHAP. XXXI.

The Recognitions which remain may be partly collected from the preceding Recognitions—and partly from the Judgment of the Court, founded on the allegations of both parties. With respect, for example, to the Recognition to ascertain, whether a person be within age or not—some mention and notice are taken of it in the fifteenth, sixteenth, and seventeenth Chapters of the present Book.

In like manner, concerning the Recognition, whether a person was, on the day of his death, seised of a certain Freehold, as of Fee or of Ward, in the thirteenth, fourteenth, and fifteenth Chapters of this Book. In the same manner, concerning the Recognition, whether a person presented the last Parson, in right of his Fee, or his Wardship, in the twentieth, twenty-first, and twenty-second Chapters of the present Book. These Recognitions follow those we have previously treated of with respect to Essoins, and proceed or cease for the same reasons.

CHAP. XXXII.

In the last place, it remains for us to speak, concerning that species of Recognition, which is called *Novel Disseisin*.[1] When any one, therefore, unjustly and

[1] As to the term *novel*, when the Action was brought before the Eyre, or Circuit, the Action or Disseisin was *ancient*, whilst,

without a Judgment, has disseised another of his Freehold; and the case fall within the King's Assise, or in other words, within the time for such purpose appointed by the King with the advice of his[1] Nobles (which is sometimes a greater,[2] sometimes, a less period); this Law comes to the aid of the person disseised, who shall have the following Writ——

CHAP. XXXIII.

"The King to the Sheriff, Health.[3] *N.* complains "to me, that *R.* has, unjustly and without a Judgment,

if the Disseisin were done since the last Eyre, then it was a *novel* Disseisin. Bracton treats largely upon the subject of novel Disseisin 160, et seq. See also 2 Inst. 24. The remedy of novel Disseisin is also treated of in the Assises of Jerusalem, with some peculiar provisions adapted to the singular circumstances in which the Holy Land was situated. (c. 63. et seq.) The respectable Translator of the Code Napoleon observes, that he has not met with the term *novel disseisin* before Magna Carta.—Amidst the attention of preparing his work for the press, he must have forgotten not only Glanville, but the Mirror.—Whatever doubt may be entertained respecting the authority of the Mirror, yet Glanville indubitably proves, that the term was well known to our lawyers antecedent to the Great Charter. (See Mirror, c. 2. s. 25.)

[1] Meaning the Parliament, according to Judge Blackstone. (1. 147. 148.)

[2] The words inserted in this parenthesis have been thought to be an interpolation of a later date. (1. Reeves' Hist. Eng. Law. 189.) Yet this suggestion may very reasonably be questioned—as the passage seems merely assertive of what must necessarily be the fact. It was a consequence of fixing the time of limitation *to the coronation of the king, his Journey into Normandy*, or any other event, that the time itself must be altering daily. (Vide 2 Inst. 94.)

[3] Vide F. N. B. 394.

"disseised him of his free Tenement, in such a Vill, "since my last Voyage into Normandy;[1] and, there- "fore, I command you, that if the aforesaid *N.* should "make you secure of prosecuting his claim, then, you "cause the Tenement to be reseised, with the Chattels "taken on it, and that you cause him with his Chattels "to be in peace,[2] until the Pentecost; and, in the mean "time, you cause twelve free and lawful Men of the "Neighbourhood to view the Land, and their names to "be imbreviated; and summon them, by good Sum- "moners, that they be then before me, or my Justices, "prepared to make the Recognition; and put, by gage "and safe pledges, the aforesaid *R.*, or his Bailiff,[3] if "he be not to be found, that he be then there to hear "such Recognition, and have there, &c. Witness, &c."

CHAP. XXXIV.

But Writs of Novel Disseisin are varied in different modes, according to the diversity of the Tenements in which Disseisins are committed. But if any Dyke[4]

[1] Sc. 1184. If the present Treatise was written in 1187, the remedy of novel disseisin stood limited to three years, which, of course, was every day lengthening until a new Æra was fixed.

[2] Affirmed by Statute of Merton, c. 37. (2 Inst. 235.)

[3] Vide Note 3. p. 225.

[4] *Fossatum.* This word occurs in Pliny. It seems to have been chiefly used by the old Lawyers in two senses—1. as denoting a camp, or intrenchment—2. as meaning a ditch, dyke, or moat. But it was not always confined to these significations—as the reader will perceive on turning to the Ancient Glossaries, particularly to that very valuable one given to the world by Spelman.

should be raised or thrown down, or the Pond[1] of any Mill be destroyed, to the injury of any person's Freehold, and such offence has been committed, within the time limited by the King's Assise, then, according to the subject matter, the Writs are varied in the following manner—

CHAP. XXXV.

"The King to the Sheriff, Health.[2] N. complains "to me, that *R.*, unjustly, and without a Judgment, "has raised a certain Dyke in such a Vill, or thrown "it down, to the nuisance of his Freehold, in the same "Vill, since my last Voyage into Normandy—And, "therefore, I command you, if the aforesaid N. should "make you secure of prosecuting his claim, then, that "you cause twelve free, &c. to view such Dyke and "Tenement, and cause their names to be imbreviated. "And summon, by good Summoners, &c." as before.

CHAP. XXXVI.

"The King to the Sheriff, Health.[3] N. has com- "plained to me that *R.*, unjustly and without a Judg- "ment, has raised the Pond of his Mill, in such a Vill, "to the nuisance[4] of his Freehold, in such Vill, or

[1] *Stagnum*, Sir Edward Coke informs us, "doth consist of "Water and Land, and, therefore, by the name of *Stagnum*, or a "pool, the water and land shall pass also." (Co. Litt. 5. a.)

[2] Vide F. N. B. 408. 409.

[3] Vide F. N. B. 407.

[4] See Bl. Com. 3. 220.

"in another Vill, since my last Voyage into Nor-
"mandy. And, therefore, I command you, that if the
"aforesaid N. should make you secure of prosecuting
"his claim, then, you cause twelve free, &c. to view
"that Pond and Tenement, &c." as before..

If, however, the Disseisin concern Common of Pasture, then, the Writ shall be as follows—

CHAP. XXXVII.

"The King to the Sheriff, Health.[1] N. complains
"to me, that *R.*, unjustly and without a Judgment,
"has disseised him of his Common of Pasture, in such
"a Vill, which belongs to his Freehold, in such Vill,
"or in that other Vill, since my last Voyage into
"Normandy. And, therefore, I command you, that
"if the aforesaid N., has made you secure of prose-
"cuting his claim, then, you cause twelve free, &c. to
"view that Pasture and Tenement, and their names,
"&c."

CHAP. XXXVIII.

In this species of Recognition no Essoin is permitted.[2]

For, on the first day, and that whether the party

[1] Vide F. N. B. 399.

[2] But one Essoin, and ıe default allowed by the Norman Code! (Grand Custum. c. 94.)

committing the Disseisin should appear or not, the Recognition shall proceed,[1] because it spares no person, neither one of full age, nor a Minor, nor will await even a Warrantor. But, if a party should acknowledge such Disseisin in Court, naming, at the same time, a Warrantor, the Recognition shall thereby cease, and the person who has so acknowledged shall be amerced to the King.

The Warrantor shall be afterwards summoned,[2] and the Plea proceed between him and the person who has, on this occasion, nominated him as Warrantor.

Yet, should it be observed, that the unsuccessful party, whether the Appellor or the appealed,[3] shall in

[1] The Norman Code describes the whole proceeding at length. The names of the Jurors having been called over in open Court, the Parties are at liberty to take any Legal Exceptions to them. The Jurors are then individually sworn to speak the truth. After this, no person shall be allowed to hold any private communication with them, unless it be the Judge. The Judge shall in the next place solemnly charge them to return a true verdict, briefly stating to them the object for their consideration. The Jurors shall then consult upon their verdict, and, in the mean time, shall be strictly guarded, least they be corrupted. Having considered of their verdict, if they all agree, one of them shall deliver it into the Judge in open Court. (Le Grand Custum. de Norm. c. 96.)

[2] The Norman Code, acting, in this instance, upon a more pure and refined principle of legislation, allowed no Warrantor to be vouched to justify a novel Disseisin—*Violentum enim est et nullo modo sustinendum, &c.* (Grand Cust. de Norm. c. 94.)

[3] *Appellans sive appellatus.* These terms are generally used in a criminal sense. Their application in the present instance may be accounted for by reflecting, that a Disseisin, being in the eye of the law accompanied by force and a violation and disturbance of the peace, was to a certain degree a criminal offence.—See Mirror, c. 2. s. 23.

every instance be amerced to the King, on account of the violent Disseisin. In addition, if the Appellor should not keep his day, then, also, his Pledges are to be amerced to the King. The same Rule prevails, with respect to the person of the other party, should he absent himself at the appointed day. The Penalty inflicted by this Constitution is merely an Amercement to the King.

But, in this Recognition, the party who has proved the Novel Disseisin, may obtain, that the Sheriff should be directed to deliver him the Chattels and the Fruits, which have, by the authority of the King's Writ, or that of his Justices, been in the mean time seised.[1] In no other Recognition does the Judgment of the Court usually make any mention concerning the Chattels or Fruits; and, unless the Sheriff has taken steps to satisfy, him out of the Chattels or Fruits, then, the party who complains of it, shall obtain the following Writ—

CHAP. XXXIX.

"The King to the Sheriff, Health.[2] I command "you, that you compel N., justly and without delay,

[1] "And, moreover, the Pursuer, who has proved the Ejectment "may effectually desire, that command shall be given to the Sher- "iff to deliver to him so much of the moveable Goods pertaining "to the Defender, or of the fruits of the Land which was arrest- "ed by the King's precept, as extends to the sum of ten Marks." (Regiam Majestatem, L. 3. c. 36.) The Reader must not start at the modern term *Ejectment*. It is only the language of *Skene*, the Translator. [2] The same writ is to be found, L. 12. c. 18.

" to render to R. his Chattels, since he complains that " he took them, unjustly and without a Judgment, from " his Free Tenement, in such a Vill, since the Disseisin " he did to him, since my Assise, of which he will re- " cover the Seisin before my Justices, by a Recognition " of Novel Disseisin, as he can reasonably shew that he " ought to have them, least more, &c. Witness, &c."[1]

[1] In quitting this Book, which treats so largely of Assises, I shall make no apology to the Reader for extracting the following observations from Mr. Reeves's highly valuable work. "It must " be observed of these *Assises* (for so they are sometimes called " by Glanville, but more commonly *Recognitions*) that they are " not all of the same kind; that *de morte antecessoris* being evi- " dently an original proceeding, independent of any other; the " rest (not excepting that *de ultima presentatione*, and that " *utrum laicum feodum vel ecclesiasticum*) being merely for the " decision of facts which arose in some original action or proceed- " ing. Thus the writs for summoning Recognitions of the latter " kind were simple writs of Summons: they mentioned that a " Plea was depending in Court by the king's writ; and they " were granted at the prayer of either party: so that they " seemed to be resorted to, by the assent of parties for settling an " incidental questior, on which they put the dispute between " them. On the other hand, the writ *de morte antecessoris* has " all the appearance of an original commencement of a suit. It " issued only upon condition the Demandant gave security to " prosecute it, *Si G. filius T. fecerit te securum de clamore suo* " *prosequendo, tunc summone*, and made no mention of a plea " depending. Of the same kind was the writ *de novâ desseisinâ*." (Reeves's Hist. Eng. Law, 188.)

Book XIV.

CONCERNING CRIMINAL PLEAS WHICH BELONG TO THE CROWN.

CHAP. I.

HAVING thus far treated of those Civil Pleas which are discussed in Court, it remains for us to speak concerning Criminal Pleas. When, therefore, any one is charged with the King's death, or with having promoted a sedition in the Realm or Army,[1] either a certain Accuser appears, or not. If no certain Accuser should appear, but the public voice alone accuses him,[2]

[1] When any one, says Bracton, speaking of the crime of læse majesty, knows another to be guilty, he is instantly to apprise the king, or one of his ministers. He should not abide in one place for two nights nor two days; but disregarding every other affair, however urgent, he should hasten to the king, scarcely daring to wait to look behind him. (Bracton 118. b. See also Fleta L. 1. c. 21. 22. and Mirror c. 8. s. 1.) In the latter Author, we find the following despotically comprehensive definition.—"Treason is every mischief which a man knowingly does or procures to be done to one he is in duty bound to be a friend to."

[2] This is a most singular part of the Code of the age when Glanville lived. The obligation upon a man to defend himself, when another starts forward to accuse him, seems the necessary result of men living together in a state of society, and, as coeval with society itself, is strongly enforced by the municipal Laws of every Nation. This seems to have been the object of the punishment *peine forte et dure*. That singular institution shewed

then, from the first, the accused shall be safely attached, either by proper Pledges, or imprisonment.[1] The truth of the fact shall, then, be inquired into, by means of many and various inquisitions and interrogations, made in the presence of the Justices, and that, by taking into consideration the probable circumstances of the facts, and weighing each conjecture that tends in favor of the accused, or makes against him; because he must purge himself by the Ordeal,[2] or entirely ab-

a strong, but rough, hand in the Legislature, more capable of directing its laws to a good and wise *end*, than nice or happy in selecting the *means*. The proceeding was naturally abolished as the Law became more refined—more humanized. As to the passage of our Author's text now before us, it receives some light from Bracton—a suggestion, for which I am indebted to Mr. Reeves's valuable work. Bracton speaks of an Indictment *per famam patriæ*, which, in all probability, was the same proceeding our Author alludes to. The foundation of that proceeding was a presumption entertained by good and grave men who deserved credit, and not the flying report of common conversation. (143. a.) But the subject receives additional elucidation from the Norman Code. *In criminalibus tamen manifestis seu notoriis maliciis quos famâ publicâ seu fide dignorum testimonium nunciant culpabiles, non expectato Juris ordine debent arrestari et carceribus mancipari.* (Grand Cust. c. 4. and 68.) In Mr. Kelham's translation of Britton's Pleas of the Crown, (page 18. Note 15.) the Reader will find the valuable record of an Indictment on suspicion. The Reader may also be referred to Bracton 143.—LL. Hen. 1. c. 45.—Mirror c. 2. s. 22. and Fleta L. 1. c. 21.

[1] "At the Common Law a man accused or indicted of High "Treason, or of any felony whatsoever, was bailable, upon good "security: for at the Common Law the Gaol was his pledge or "security that could find none." (2 Inst. 189.) This serves to elucidate the text, which is obscure from its brevity. A similar explanation is given in the progress of the present chapter, but is qualified, with the exception of the plea of Homicide.

[2] *Per legem apparentem.* Alluding to the passage now before us, Sir Henry Spelman observes, "I do not think it should be un-

solve himself from the Crime imputed to him. But if on the trial by the Ordeal, a person is convicted of a Capital Crime, then the Judgment is of life and members which are at the King's mercy,[1] as in other Pleas concerning Felony.

Should, however, a certain accuser appear in the first instance, he shall be attached by Pledges, if he can produce any such, to prosecute his Suit. But, if he is unable to adduce any Pledges, it is usual to trust to his solemn promise,[2] as in all Pleas concerning Felony. Yet is it customary in these cases to confide in a promise, least by exacting too hard a security, others might be deterred from making a similar accusation.[3] Security having been taken from the Accuser to prosecute his Plea, then, the party accused, is, as we have observed, usually attached by safe and secure Pledges; or, if he cannot produce any pledges, he shall

"derstood of the Duel, but the Ordeal." This conjecture is countenanced by the 87th Chapter of the Grand Norman Custumary, however true it may be, that the *lex apparens* was, in the general sense of the expression, applied to the Duel. (Spelm. Gloss. ad voc. *lex* and his Reliq. p. 80.)

[1] *Ex regiæ dispensationis beneficio, tam vitæ, quam membrorum suorum ejus pendet judicium* is the original passage. I have availed myself of the Translation of the Regiam Majestatem. "And, if any man is condemned of that crime, his judgment "and punishment of his life and limbs depend only upon the "king's benefit and good will, as in all other pleas of felony and "sedition against the realm." (L. 4. c. 1.)

[2] *Fidei suæ religionis*—"his faithful promise is sufficient," says the Regiam Majestatem. (L. 4. c. 1.) In the opinion of the canonists the *fidei interpositio* was equally binding with an oath. (Lyndwood's Provinc. 271.)

[3] Bracton gives the same reason. (118. b.)

be cast into Prison. But, in all Pleas of Felony, the Accused is generally dismissed on pledges,[1] except in a Plea of Homicide, where, for the sake of striking terror, it is otherwise enacted. The next step usually resorted to, is to appoint a day to the parties, pending which, the usual Essoins are allowed to be cast.

At length, the Accuser should propose his charge: that he had seen, or by some other proof in Court, that he perfectly well knew, that the Accused had conspired or done something against the King's life; or to move a sedition in the Realm or Army; or to have consented, or given Counsel, or delegated an authority, towards effecting such object; and the Accuser should allege, that he was prepared to prove his charge, according to the direction of the Court.[2]

Should the accused, on the other hand, deny, in due manner[3] in Court, every thing the other had asserted, it is usual to decide the Plea by the Duel. And here it should be observed, that from the moment the Duel is waged, in Pleas of the kind we are now treating of, neither of the parties can add nor diminish any thing from the words employed in waging the Duel, or, in any other measure decline or recede from his undertaking, without being held as conquered, and liable to the penal consequences.

[1] But this the Mirror terms an abuse. (c. 5.)

[2] See Bracton 119. a. Fleta L. 1. c. 21. s. 2.

[3] *Seriatim de verbo ad verbum.* (Fleta L. 1. c. 21. s. 2.) *Sufficit si communiter se defenderit dum tamen de causa:* (Ibid.) a greater strictness in pleading being required on the part of the accuser than the accused.

Nor can the parties be afterwards reconciled to each other, by any other mode, than the King's License, or that of his Justices. But if the Appellor be conquered, he shall be amerced to the King, the nature of which has been sufficiently explained in a former part of this work.

What penalties also and infamy he shall incur, if conquered, have been sufficiently detailed. If the Accused be conquered, the Judgment that awaits him has been mentioned just before, to which may be added, the confiscation of all his Chattels, and the perpetual Disinherison of his Heirs.[1]

Every free Man of full age is admissible as an Accuser, in a prosecution of this kind. Should, however, a Minor bring an Appeal, he shall be attached, in the manner we have before stated. A Rustic[2] is also admissible; but a Woman shall not be received to make an accusation in any plea of Felony, unless in some particular instances, concerning which we shall presently speak. But the Accuser may, in Pleas of the kind we are discussing, decline the Duel, either on account of his age, or by reason of his being adjudged to have received a Mayhem.[3]

[1] So great, indeed, is the crime, says Bracton, that scarcely is it permitted to the Heirs that they should live. (118.) In speaking of Treason, Bracton warms with his subject; and the grave Lawyer starts into the animated Orator.

[2] *A Husbandman*, says Skene. (Reg. Maj.) I translate the word literally, and refer the Reader to the last passage of the present chapter. Vide Mirror c. 2. s. 28.

[3] *Mahemium* is said to be derived from the old French word, *mehaigne*. (Co. Litt. 126. a. 288. a. Cowell and Spelm. Gloss.)

But the age of the party, in such a case, ought to be sixty years or upwards. Mayhem signifies the breaking of any bone, or injuring the head, either by wounding or abrasion. In such case, the Accused is obliged to purge himself by the Ordeal, that is, by the hot Iron, if he be a free Man—by water, if he be a Rustic.[1]

[1] The trial by *Ordeal*, the favorite offspring of Superstition, has been by Fleury, Le Brun, and others, supposed to be derived from the Ancients, because Pliny (L. 8. c. 2.) mentions a family in Tuscany, upon whom the sacred fire, made in honor of Apollo, had no effect. But M. Houard, with much more appearance of reason, imagines, that it originated from the Miracles attributed by the Christians to their Saints. (*Traités sur les coutumes Anglo-Normand. Tom.* 1. *p.* 577.) However that may be, this mode of Trial existed here so early as the Reign of Ina; and William the first found it in use in this country, when he mounted the throne. His Normans, attached by early habit to the Trial by Duel, rejected a mode of decision, which appeared to them as a superstitious formality, though it was still suffered to be resorted to by old and maimed men, and by women. According to the Laws of Ina, the accused had *the choice* of the Trial by fire, or that by water. If he preferred the former, an Iron was prepared that weighed three pounds at the most. No person, except the Priest, whose duty it was to preside on the occasion, entered the Temple, after the fire destined to heat the Iron was kindled. The Iron being placed upon the fire, two men posted themselves on each side of the Iron, to determine upon the degree of heat it ought to possess. As soon as they were agreed upon this point, the same number of men were introduced *ab utroque latere*, and they also placed themselves at the two extremities of the Iron. All these witnesses passed the night fasting, &c.

At day-break, the Priest, after sprinkling them with the holy-water, and making them drink, presented them with the Book of the Evangelists to kiss, and then crossed them. The Mass then began. From that moment, the fire was no more increased: but the Iron was left on the embers, until the last Collect. That finished, the Iron was raised, and the most profound silence was observed, in praying the Deity to manifest the truth. At this

CHAP. II.

A PLEA, concerning the fraudulent concealment of Treasure Trove, is usually managed, in the manner and order above stated, where a certain Accuser appears.[1] But, if a Man is accused of this crime by the public voice only, it is not usual, according to the Law of the Land, for him to purge himself by the Ordeal,[2] although by the Assise a different course may be resorted to, unless he has been first convicted, or has confessed in Court, that he has found and taken some

instant, the accused took the Iron into his hand, and carried it to the distance of nine feet, *juxta mensuram pedum ejus.* The Trial being ended, the hand of the accused was bound up, and the bandage sealed; and, three days after, the hand was examined, to ascertain whether it was or not *impure*, which M. Houard, thus explains: *ce qui doit, je crois, faire entendre que l'on n'étoit pas coupable, quand la main conservoit des marques de brûlure mais seulement lorsque la brûlure tomboit en supuration.* (*ubi supra.*) But, if the accused elected the Trial by Water, then, the Water was placed in a Vessel, and heated to the highest degree. For inferior Crimes, the accused plunged his arm up to the wrist: for crimes of deeper dye, he plunged it up to the Elbow. In every other part of the ceremony, the two species of Trial by water and fire agreed. (LL. Inæ c. 77.) The Mirror coincides with the text of Glanville, (c. 3. s. 23.) and Lord Hale informs us, "that in all the time of King John the "purgation *per ignem et aquam*, or the Trial by *Ordeal*, contin-"ued, as appears by frequent Entries upon the Rolls; but, it "seems to have ended with this king, for I do not find it in use "in any time after." (Hist. Com. Law. 152.)

[1] Vide Bracton 119. b. Britton c. 17. s. 1. Dial. de Scacc. L. 2. s. 10. The modern French Code gives the treasure to the person who finds it, if the owner of the Estate: if not, half to him, and the other half to the owner of the Estate. (Code Napoleon.)

[2] Yet see LL. Hen. 1. c. 63. Ed. Wilkins.

kind of Metal in the place in question.[1] But, if upon this fact the party be convicted, the presumption being against him, he shall be obliged to purge himself by the Ordeal, that he had not found or taken any more from the place in question. In other respects, the proceedings are as before stated.

CHAP. III.

When any one is accused of Homicide,[2] the Judgment is regulated by, and proceeds on, the distinction before laid down. It should, however, be observed, that it is not usual to dismiss upon pledges a person accused of this Crime, unless in compliance with the King's pleasure. But there are two species of Homicide. The first is called Murder which is secretly perpetrated—no one seeing—no one knowing of it,[3] save

[1] At the time of Bracton, a probable presumption of a man's having possessed himself of treasure-trove, arising from his sudden dressing or living in a higher style than he had been accustomed to, was held a sufficient ground to commit the party to Gaol. (120. a.)

[2] Vide Fleta L. 1. c. 23. Bracton. 120. b. 134. a.

[3] "The name of murder (as a crime) was anciently applied to "the secret killing of another which the word *moerda* signifies "in the Teutonic Language." (4 Bl. Comm. 194.) In support of this position, the learned Judge cites the present passage of our author's text. Other authorities may be added. *Murtre, est quant home est tue de nuit ou de repos dehors ou dedans vill.* (Assises de Jerusalem, c. 85.) *Porro murdrum propriè dicatur, mors alicujus occulta cujus interfector ignoratur.* (Dialog. de Scacc. L. 1. s. 10. See also Bracton 121. Fleta 34. s. 6. Britton c. 6. s. 1. and c. 23.—Regiam Majestatem L. 4. c. 5.)

the person committing it, and his Accomplices, so that Hue and Cry [1] cannot be presently made after the Offenders, as ordained by the Statute [2] upon this subject.

To prosecute an accusation of this kind no one is admissible, unless he be of the blood of the deceased, and under such restrictions is this rule adhered to, that the nearer Heir shall exclude the more remote from the Appeal.[3]

There is also another species of Homicide, as appears from the general Term, which is called simple Homicide.

In this suit also no one is admissible to prove the Accusation, unless he be allied in blood to the deceased,[4] or be connected with him by the tie of Homage, or Dominion, so that he can speak of the death upon the testimony of his own sight. It should also be added, that a Woman [5] is heard in this suit, accus-

[1] *Clamor popularis* is the expression, which, on the authority of Lord Coke, I have rendered Hue and Cry. Lord Coke informs us, it was known before the conquest. (2 Inst. 171. 172.) It does not appear to have been peculiar to this country, as a similar institution seems anciently to have existed in some parts of France. (Beaumanoir c. 67.)

[2] "This Statute is not now extant," says Lord Coke. (2 Inst. 171.)

[3] *De multro (murder) vel Homicidio propinquior in genere sequelam faciendi retinet potestatem: Si autem propinquior in non ætate fuerit vel ætatem transegerit, alius propinquior interesse poterit in sequela, vel alius de genere in quem consenserit omnis parentela.* (Le Grand Custum. de Norm. c. 69. See also Britton c. 1. s. 11.)

[4] Vide Co. Litt. 25. a.

[5] "And yet not of all the wives, but of her only who lieth be-"tween his arms, which is as much as to say, in whose seisin

ing any one of her Husband's death,[1] if she speak as being an Eye-witness[2] to the fact, because Husband and Wife are one flesh. And a Woman is generally admitted to be heard, accusing any one of having committed an injury upon her person, as will be presently shewn. It is at the election of the accused either to abide by the Woman's proof, or to purge himself by the Ordeal, from the crime imputed to him. A person accused of Homicide is sometimes compelled to undergo the legal Purgation, if he was taken in

" he was murdered; for if he had many wives, and all were " alive at the time of his murder, nevertheless she only is ad- " mitted to bring the appeal of all the rest, whom he last took " to wife; and the reason thereof is, because it belongeth not to " the Temporal Court to try who was his wife of right, and " which, in fact, and the appeals of all others are to be sus- " pended, pendant the same appeal brought" (Mirror c. 2. s. 7. See also Bracton 125. a. Fleta L. 1. c. 35. and 2 Inst. 316.)

[1] Lord Coke, in two instances, cites the present chapter of Glanville as one of the authorities on which he founds his assertion, that previously to the Great Charter a woman, as well as a man, might have had an appeal of the death *of any of her Ancestors*. (Co. Litt. 25. b. and 2 Inst. 68.) It is impossible to conceive how Glanville corroborates this bold position. He is a very strong authority for the contrary doctrine, and excludes expressly in this chapter and by relation in the first chapter of the present Book, a woman's right of appeal in every instance, except that of the death of her Husband, and that of a personal injury. *Bracton* also in the most decided language confines a woman's right of appeal to these two instances. (fo. 125, and 148.) Great as Lord Coke is, his deductions and citations from the more ancient writers are not by any means implicitly to be relied upon. His name has thrown a lustre over many an error. Nothing would be more easy than to adduce innumerable instances in support of the truth of this assertion.

[2] For it was a good ground of defence, that the Plaintiff was not present at the time when the mortal blow was given. (Vide 2 Inst. 316.)

flight by a Crowd pursuing him, and this be regularly proved in Court by a Jury of the County.

CHAP. IV.

The Crime of Burning[1] is proceeded upon, discussed and terminated, under the form and order we have described.

CHAP. V.

The Crime of Robbery[2] may also be passed over, as the suit has nothing to distinguish it from the others.

CHAP. VI.[3]

The Crime of Rape[4] is that with which a Woman charges a Man when she alleges, that he committed a

[1] "Burners are those," says the Mirror, "who burn a City, "Town, House, Men, Beasts, or other Chattels, feloniously in "time of peace for hatred or revenge." (Mirror c. 1. s. 8. See also Britton chap. 19.)

[2] *Roberia*, so called, says Lord Coke, because the goods are taken as it were *de la robe*, from the Robe, that is from the person. (Co. Litt. 288. a. and 3. Inst. 67.) Cowell deduces the term from the French *robbe*, *vestis*, and Spelman from *raubas*, meaning the same thing. The Saxons used their term *reaferar* in a similar sense, *reaf* signifying, *vestis*. For Travellers had in former times rarely any thing but their dress of which they could be robbed. (See Cowell and Spelm. Gloss.) Under the Laws of Ina the punishment of Robbery was to restore the thing purloined, and to pay a fine of 60 shillings. (LL. Inæ. c. 10.)

[3] For obvious reasons I have translated the present Chapter in a general manner. [4] Vide Mirror c. 1. s. 12. and Bracton 147. a.

violence on her person, whilst in the King's peace.[1] A Woman, having suffered any such violence, is bound immediately, whilst the crime is recent, to go to the nearest village, and there state the injury to respectable Men, and shew the external marks of violence.[2] She should, in the next place, do the same thing to the Chief Officer of the Hundred; and, lastly, she should publicly complain of her injury in the next County Court. An accusation of this kind being made, the Judgment is as before laid down. A Woman, accusing any one of such a Crime, is heard in the same manner, as is usual concerning any other personal injury which has been offered her. But it should be understood, tha it is at the Election of the Accused in such a Case, either to submit to the burthen of making Purgation, or to sustain the woman's proof against him. It should likewise be remarked, that if any one be convicted in a suit of this kind, the Judgment will be similar to that in the foregoing suits. Nor will it suffice, after Judgment, if the Malefactor wish to take the Woman he has injured to Wife. For thus it would frequently happen, that Men of servile condition would, by reason of one pollution, bring perpetual disgrace upon Women of noble birth, or that Men of high rank would be disgraced by inferior Women, and thus dishonor their fair lineage. But,

[1] Vide LL. Gul. Conq. c. 19. and 2. Inst. 180. 181.

[2] *Visio autem virginis defloratæ per septem mulieres viduas vel maritatas fide dignas debet fieri, per quas, si necesse fuerit, de defloratione veritas recordetur.* (Grand Custum. de Norm. c. 67. See also Britton c. 1. s. 30. &c.)

previously to Judgment, it is customary for the Woman and the accused to be reconciled, by means of a marriage between them; but this step is authorised by the License of the Prince, or that of his Justices, and the consent of the Parents.

CHAP. VII.

The crime of Falsifying,[1] in a general sense, comprises under it many particular species. As, for example, false Charters--false Measures—false Money—and others of a similar description, which contain such a falsifying, on which a person ought to be accused, and, if convicted, condemned. The manner and order of prosecuting these different species of the crime may be sufficiently collected, from what has gone before. One thing, however, should be observed, that if a person be convicted of falsifying a charter, it becomes necessary to distinguish, whether it be a royal[2] or a private charter; because in the former case, the party, when convicted of this offence, shall be condemned, as in the crime of læse majesty. But, if the charter be a private one, then, the person convicted is to be dealt with in a milder manner, as in other inferior crimes of

[1] See Britton c. 4. Bracton 119. b. and Fleta L. 1. c. 22.

[2] Of the king's Charters, says Bracton, neither the Justices nor private Individuals can dispute, nor interpret them, if a doubt arise; but recourse must be had to the king himself; and if the Charters be defective, through rasure, or from a false seal being attached to them, it is better and safer to decide the matter in the king's presence. (Bracton fo. 34. a.)

Falsifying, which are punished by the loss of members only, according to the will and beneficence of the princely disposition, as we formerly observed.

CHAP. VIII.

As to Thefts and other Pleas which fall within the Jurisdiction of the Sheriff,[1] as they are conducted and decided according to the various customs of different Counties, they fall not within the scope of my present plan, which is solely confined to the subject of the Chief Court.

The Book of the Laws of England is finished.

[1] Having already observed, that this part of the Sheriff's Jurisdiction was taken away by Magna Carta, I shall conclude these Notes with extracting a passage from the Norman Code, from which we may collect most of the various branches of the Sheriff's Jurisdiction and his duty, in the opinion of the Lawyers of Normandy. *Officium autem Vicecomitis est placita tenere: vias antiquas et semitas et limites aperire: aquas vero transmotas ad cursum debitum reducere, et de malefactoribus et seditiosis mulieribus et arsionibus et deflorationibus virginum violentis et ceteris actibus criminosis diligenter et secretè inquirere.* (Le Grand Custum. de Norm. c. 4.)

INDEX.

PAGE

ABBOTS cannot without King's consent alien..... 123
——— of Canons Regular may appear for their Order.... 229
Absence of Lords..... 65
——— of Parties..... 80
——— of Summoners..... 26
——— of Tenant..... 27
——— of Demandant..... 28
Accusations..... 278
Accuser, certain or uncertain.....278, 279
Admeasurement of Dower—Writ of..... 112
Administration, who entitled to..... 137
Advocatio (Note 1.)..... 69
Advowsons—general doctrine of, begins at..... 69
Æsnecia (Note 1.)..... 127
Afforciament (Note 1.)..... 53
Age, Writ to ascertain 261
Aids (Note 1.)..... 190
Aisiamenta (Note 1.)..... 239
Allegiance.....177, 178
Amercements..... 202
——— in County Courts belong to Sheriff..... 193
Appeal of Felony..... 141
Appellans (Note 3.)..... 275
Appeals, who may prosecute..... 282
Arbelastarius (Note 1.)..... 232
Arrha (Note 4.)..... 216
Assisa (Note 1.)..... 36

PAGE

Assise Grand (see Grand Assise)..... 44
Assises, general doctrine of, begins at..... 246
Assise of *darrein presentment*..... 263
——— *mort d'auncestor*..... 246
——— *novel disseisin*..... 270
——— when it lies not for burgage tenure..... 255
Attachment (Note 1.)..... 66
Attornato faciendo—Writ *de*..... 226
Attornies—general doctrine concerning, begins at..... 223
Attorney may cast Essoins for himself..... 226
——— may be removed..... 228
Avunculus (Note 1.)..... 125

B.

Bailiff cannot, as such, appear as Attorney..... 225
Ballivus (Note 1.)..... 225
Banco, Justicii in (Note 2.)..... 41
Baro (Note 3.)..... 173
Bastards cannot inherit..... 147
——— formerly inherited in Wales (Note 1.)..... 148
——— who succeed to..... 150
Bastardy, when bar to an Assise..... 254
——— Writ to inquire concerning..... 148
Bishops cannot without King's consent alien..... 123
——— do not when consecrated perform Homage..... 180
——— do when consecrated perform Fealty..... 180
Bladum (Note 2.)..... 33
Boscus (Note 2.)..... 239
Breve (Note 4.)..... 4
Burgage Tenure—not entitles King to Custody..... 142
——— when it bars an Assise..... 255

C.

Campio (Note 2.)..... 36
Capital Messuage not allotted in Dower..... 108

PAGE

Cellarii (Note 1.) 229
Champion, when hired, inadmissible 38
——— if formerly a Villein, objectionable 89
——— when conquered how punished 39
——— collusively vouched (Note 2.) 219
Charters, proof of 214
——— falsifying 290
Chattels when forfeited 152, 156
——— of Intestate 151
——— of Usurer 151
——— not distrained for non-appearance 199
Chief Manor not allotted in Dower 109
Chirograph 168
Clamat (Note 1.) 5
Clamor popularis 286
Coin false 290
Commodatum (Note 2.) 214
Concord, why called Final 166
——— breach of, how punished 167
Concords, general doctrine of,—begins at 161
Conditions 206
Conductum (Note 1.) 221
Confiscation 282
Consanguinity in questions of freedom 85
——— in questions of Intestacy 137
——— bar to Assise of *Mort d'auncestor* 255
Constitution (Note 1.) 49
Consuetudines (Note 4.) 165
Consuetudinibus et servitiis—Writ *de* 192
Contempt of Court ..... 30, 66, &c.
Contemptus Brevium (Note 4.) 4
Contenement (Note 3.) 190
Contracts private 221
Counts, when they vary from Writ, effect of 214
Courts inferior—when allowed Records 170, 173

PAGE
Courts, County—differ in their Customs..... 244
——— of Lords—differ in their Customs..... 234
Crimen falsi (Note 2.).....2, 290
Croftum (Note 3.)..... 164
Curtesy of England (Note 1.)..... 158
Custody of Heirs..... 139
——— discharges Relief—when..... 184
Customs.....128, 133
Custum (Note 1.)..... 29

D.

Darrien presentment—Writ of..... 263
Debt—Writ of..... 198
Debts—Pleas concerning..... 198
——— how proved..... 213
Default, how punished. 16
Deposit.. 199
Descents, general Canons of..... 124
——— amongst Grecians, Normans, Lombardi, &c. (Note 2.)..... 125
Desponsatio (Note 1.)..... 94
Disseisins..... 270
Distresses.....103, 179, 191, 199, 228, &c.
Divisa (Note 1.)..... 133
Divorce for Incontinence bars Dower..... 110
——— for Relationship bars Dower..... 110
Dominium (Note 1.). 123
Dower, general doctrine of, begins at..... 93
——— in what senses used..... 93
——— *ad Ostium Ecclesiæ*..... 94
——— *Ex assensu Patris*..... 111
——— admeasurement of..... 95
——— how demanded..... 101
——— not of land already in Dower..... 109
——— its assignment not postponed for Heir's Infancy.... 109

PAGE
Dower, barred by Divorce for Incontinence or Relationship. 110
——— Writ of Right of..... 99
Duel, Trial by..... 83
—— its rise and decline (Note 1.)..... 84
—— reason of (Note 1.)..... 85
—— not allowed in questions of Villenage..... 88
—— not waged by Villein-born though Knighted..... 89
—— Courts not bound to defend their Records by..... 171
—— Courts bound to defend their Judgments by..... 171
—— in Criminal matters..... 282
—— when only compromised by License..... 282
Duodecima Manu (Note 2.)..... 8

E.

Earnest..... 216
Ecclesiastical Court—holds not plea of Debt—when..... 212
——————— when it has Jurisdiction generally... 245
Election of Knights on Grand Assise..... 48
Enfranchisement—modes of effecting..... 88
——————— under Saxons (Note 1.)..... 88
Escambium (Note 1.)..... 61
———— when Bracton wrote (Note 1.)..... 61
Escheat for want of Heir..... 154
——— for incontinence of female Heir..... 154
——— for felony..... 154
——— for conviction of Theft..... 156
——— for Outlawry..... 155
Essoins, principal kinds of (Note 1.)..... 6
——— general doctrine of—begins at..... 6
——— not allowed by one of full age against Minor..... 256
——— nor in Novel Disseisins..... 251
——— may be cast by Attorney for himself..... 226
Essoiners may appoint Essoiners..... 18
———— Writ to take as Defaulters..... 13

PAGE
Essonium (Note 1.)..... 6
Exceptions to Jurors..... 50
Exchequer..... 142
Executors—who..... 136

F.

Failure of Justice in Lord's Court..... 234
Faldæ (Note 2.)..... 165
Faldæ secta (Note 2.)..... 165
Falsifying Judgments..... 172
False-claim, punishable..... 30
Fama publica (Note 2.)..... 278
Fealty 129, 157
Fee, how lost..... 179
Felony—appeal of..... 141
——— forfeits Land..... 154
Females, Custody of..... 143
Feme sole may make a Testament..... 134
—— covert cannot without Husband's consent..... 134
Feodum (Note 2.)..... 103
Fidei interpositio (Note 2.) 280
Final Concord—forms of.....162, 163
Fine—bar to Assise of *Mort d'auncestor*..... 254
Fines—general doctrine of—begins at..... 161
Forfeitures.....154, 155, 156, 179, 282, &c., &c.
Forgeries..... 290
Forinseca (Note 1.)..... 165
Forisfacio (Note 2.)..... 146
Forisfamiliatus (Note 1.)..... 131
Fossatum (Note 4.)..... 272
Francalmoigne..... 114
Freedom, how proved..... 85
——— not to be purchased with Villein's own money... 89
——— means of acquiring..... 88
Frussetum (Note 2.)..... 164

G.

PAGE
Gifts of Land—how far allowed..... 114
———— defective without seisin..... 114
Grand Assise..... 44
———— bars to..... 42
———— the Essoins it allows..... 49
———— concerning what things..... 51
Gylda (Note 4.)..... 90

H.

Heirs—how far bound by Ancestors' Gifts..... 124
—— how divided..... 124
—— when disinherited (see Forfeiture, Escheat, &c.)
—— in right line preferred to transverse line.....124, 129
Heres remotior (Note 4.)..... 117
—— *Ultimus*, a Man's Lord..... 153
Hiring..... 221
Homage, difference between and Fealty (Note 1.)..... 128
———— performed by Husband of Eldest Daughter..... 128
———— general doctrine of, begins at..... 175
———— must be received by Lord, when..... 177
———— performed to several Lords for different Fees..... 177
———— liege, when due..... 177
———— form of..... 177
———— effect of..... 178
———— not performed by Women..... 176
———— not by consecrated Bishops..... 180
———— for what due..... 181
———— to whom..... 182
Homicide, its species..... 285
———— properly so called..... 286
————not bailable.....281, 285
Hue and Cry..... 286
Husbands—their power over their Wives' Inheritance..... 129
———— perform Homage for Wives' Land..... 177

I.

PAGE
Impetitio (Note 1.) 262
Imprisonment 279, 281
Incendiaries 288
Incontinence in female Heirs how punished 146
——— divorce for, bar to dower 110
Infamy 56
Institution (Note 1.) 49
Interrogations in Pleas of Crown 279
Intestacy 136, 151

J.

Judgments inferior Courts bound to defend by Duel 171
——— falsifying 172
——— in Capital Offences 280
Judicium Dei 282
Jurata 46, 194
Juris Utrum (Note 1.) 266
Jurors 50, 194
Justices Itinerant (Note 2.) 151
Justicia (Note 3.) 141
Justiciare (Note 1.) 192
Justicii in Banco (Note 2.) 41

K.

King's Death, crime of 2, 278
——— Peace ..... 3, 27, 30, &c.
——— Writ of Warranty 8
——— Charters falsifying 290
Knight's Heir in custody of Lord 140
Knights summoned as Jurors on Grand Assise 48
Knight's Fee, relief of 185
Knight, if formerly Villein, objectionable as Champion 90

L.

PAGE
Languor (Note 2.) 15
Law, loss of 89
Lese Majesty 2, 278
Legacy 137
Lex Apparens (Note 2.) 279
Libertate probanda, writ *de* 84
Limitation of *Mort d' Auncestor* 247
——— of *Novel Disseisin* 272
Loans 199
Locatum (Note 1.) 221
Lords may distrain their Tenants 179

M.

Magna Assisa Eligenda, writ of 48
Mahemium (Note 3.) 282
Manor chief not to be allotted in Dower 109
Maritagium (Note 1.) 113
Marriage of female Heirs—Lords consulted on 144
Marriage-hood, free or not 156
Mayhem protects from duel 282
——— what 282
Measures false 290
Medletum or *Melletum* (Note 1.) 8
Messuage capital 109, 127
Metal discovering 284
Minor when bound to answer generally 260
——— must answer Minor in his custody 140
——— no Essoin against, by one of full age 317
Minority of Heir of a Knight 139
——— of a Sockman 139
——— of a Burgess 139
Misericordia (Note 1.) 28
Mort d'Auncestor, Assise of 257

PAGE
Mort d'Auncestor, bars to 254
——————— writ of ..... 247, &c.
Mortgage 284
———— when usurious 209
Mulier (Note 1.) 97
Mulieratus filius (Note 2.) 116
Mutuum (Note 1.) 204
Murder 285
——— not bailable 2, 285

N.

Nativus (Note 2.) 83
Ne injuste vexes, writ of 237
Nihil habet, writ of 106
Non-plevin (Note 1.) 14
Novel-Disseisin, assise of 270
——————— meaning of Term (Note 1.) 270
——————— allows no Essoin 250, 274
——————— allows of vouching warrantor 275
Nuisances 194, 273, 274

O.

Ordeal (Note 1.) 283
Outlawry 154
Oxland (Note 2.) 162

P.

Parage (Note 3.) 181
Parentela (Note 3.) 110
Pares (Note 1.) 180
Pasture, admeasurement of 238
———— disseisin of 274
Perjury 55
Persona (Note 2.) 69

PAGE
Pleas, how divided..... 1
——— criminal appertaining to Crown.....2, 278
——— criminal appertaining to Sheriff..... 3
——— civil discussed in King's Court..... 3
——— civil discussed in Sheriff's Court.....4, 236
Pledges..... .....27, 200
——— in criminal cases..... .....6, 7, 279
——— of Essoiners, writ to summon..... 13
Pone, writ of..... 100
Possession, writs to deliver..... .....14, 40, &c.
Præcipe quod reddat, writ of..... 5
Precariæ (Note 3.)..... 165
Presentation, when devolving on Tenant in Dower..... 109
Proclamo (Note 1.)..... 86
Prohibition, writs of.....46, 82, &c.
Purchase..... 216
Purgation by ordeal..... 283
Purpresture, or Propresture..... 193
Putagium (Note 3.)..... 147

Q.

Quæstus, or *Questus* (Note 3.)..... 95
Quit-claim..... 254

R.

Rape..... .....2, 289
Rationabili parte Bonorum, writ of.....137, 240
Rationabilibus divisis, writ of 197, 239
Recognitiones (Note 2.)..... 4
Recognitions, general doctrine of..... 246
Record, courts of..... 170
Records, of inferior courts not conclusive..... 170
——— when allowed to inferior courts..... 170
——— no court bound to defend by Duel..... 171

PAGE
Recreantisa (Note 3.) 39
Rectatus (Note 2.) 27
Reliefs 184
Relief of Knight's Fee 185
——— of Socage Lands 185
——— of Baronies 185
——— once paid not again due 184
——— when not due (Note 2.) 184
Replegiare (Note 1.) 73
Replegiare de averiis, writ of 238
Reseantisa (Note 1.) 10
Respectus (Note 1.) 22
Responsalis (Note 1.) 223
Right, writs of ..... 231, 233, &c.
Robbery 288
Roberia (Note 2.) 288
Rustic may bring an Appeal 282
——— tried by water-ordeal 283

S.

Sale 216
Seals 213
Sedition 2, 278
Seisina (Note 2.) 7
Seneschallus (Note 2.) 225
Sequela (Note 1.) 238
Serjeanties 186
Servientes (Note 1.) 20
——— *Domini Regis* (Note 1.) 20
Sextarii (Note 1.) 47
Sheriffs, their jurisdiction ..... 2, 4, 236, &c.
——— entitled to Amercements in county courts 193
Socagium (Note 3.) 118
Socage Lands, how descendible 126
——— how long partible (Note 2.) 126

PAGE
Socage Lands, Relief of..... 185
Sockman's Heir in whose custody..... 142
Stagnum (Note 1.)..... 273
Steward cannot, as such, act as Attorney..... 225
Stika, or *Stica* (Note 2.)..... 47
Succession, Rules of..... 124
Suits, how removed from Lord's to County Court..... 235
Summons, doctrine of, begins at..... 5
——— writs of.....5, 48, &c.
Suretyship..... 201

T.

Tales..... 52
Terminus (Note 2.)..... 22
Testaments 134
Theft..... .....2, 156, &c.
—— cognisable by Sheriffs..... 2
Toft (Note 3.)..... 162
Treasure Trove.....2, 284
Treason.....2, 278, &c.
Turbaria (Note 4.)..... 164

U.

Ultima presentatio, Assise of..... 262
Ultimus Heres, a Man's Lord..... 153
Utlagatus (Note 3.)..... 154
Usury, when Mortgage amounts to..... 209
—— punishment of..... 151
Usurers, not convicted whilst living..... 151

V.

Vassal..... 178
Vicinetum (Note 1.)..... 32
View..... 31

PAGE
View, writ directing..... 32
Villa privilegiata (Note 3.)..... 90
Villeins-born,..... 91
Villenage, general doctrine of, begins at..... 83
——— plea of, not held by Sheriff..... 84
——— when bar to an Assise..... 254
Villenagium (Note 1.)..... 83

W.

Wardship.....139, 258, &c.
Warrantia Dici, writ of..... 8
Warrantor, writ to compel him to appear..... 62
Warrantus (Note 2.)..... 59
Warranty, general doctrine of, begins at..... 59
——— writ of.....62, 102
——— vendors bound in..... 218
Waste of Felon's Lands..... 155
Widows must ask Lord's consent to marry..... 145
——— not liable to custody..... 147
——— do not forfeit for Incontinence..... 147
Wife cannot, in Husband's life, sell her dower..... 97
—— her husband may sell her Dower..... 97
—— may appoint Husband her Attorney..... 227
Will of Lands not allowed.....115, 136
—— of personal, how far allowed..... 134
——————— witnesses to..... 136
——————— under Ecclesiastical cognizance..... 137
Women can do no Homage..... 176
——— in what cases they can prosecute Appeals.....286, 287
Writs, Errors in the effect of..... 244
——— forms of.....5, 8, 12, 13, 14, 15, 25, 32, 40, &c., &c.

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